

Contracting Officer's Representative Course



PA-296

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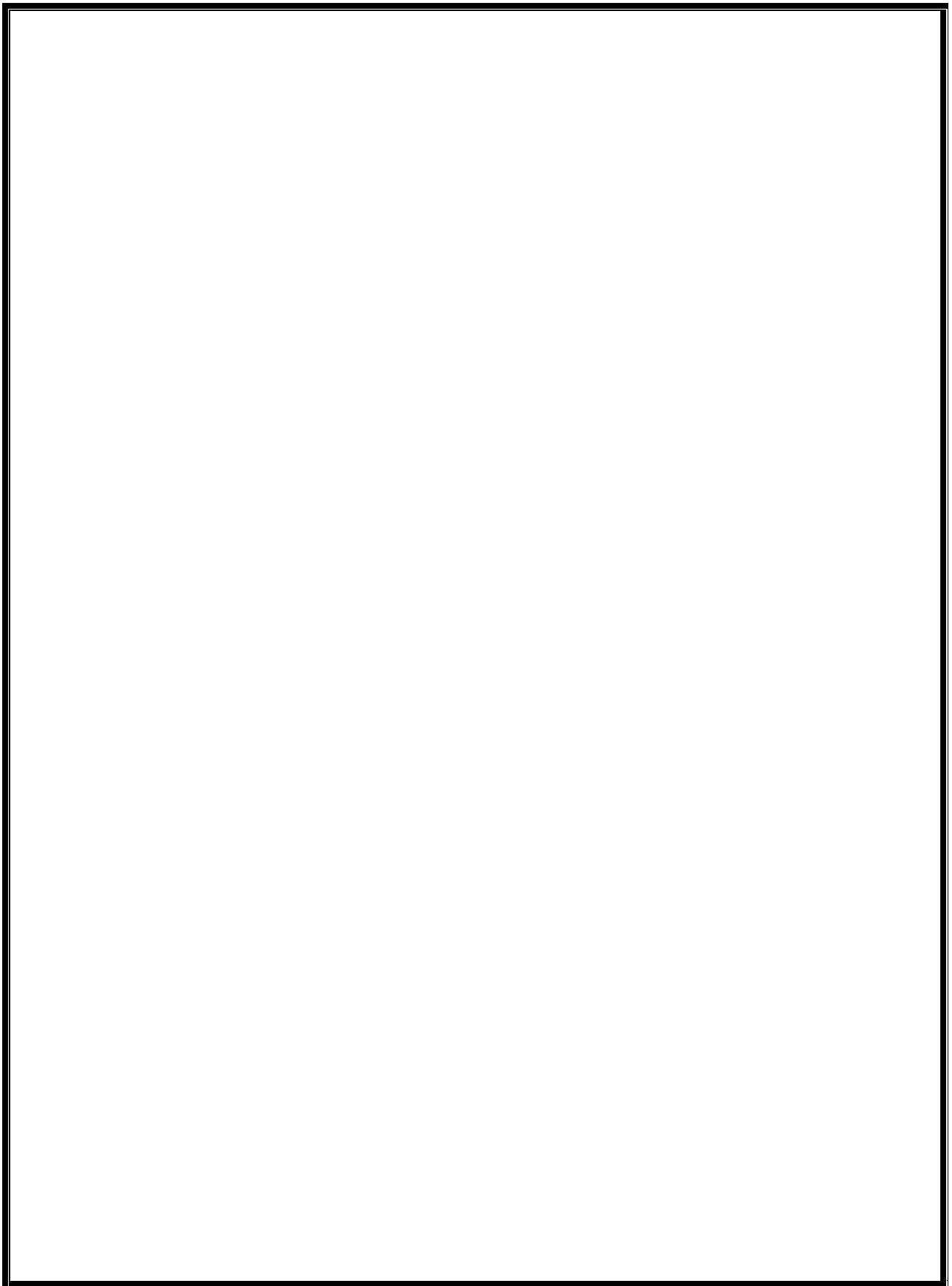


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UNIT 1 — INTRODUCTION

UNIT OBJECTIVES

AFTER READING THE MATERIAL AND COMPLETING THE REVIEW EXERCISES, YOU WILL BE ABLE TO—

- Identify general COR functions;
- Identify concepts of contract and agency law that are important to a COR;
- Identify regulations applicable to CORs;
- Identify essential contract elements;
- Differentiate between actual authority, apparent authority, and implied authority;
- Define “unauthorized commitment”;
- Name the consequences of unauthorized commitments; and
- List the steps by which unauthorized commitments may be ratified.

IMPORTANCE OF UNIT TO COR

The purpose of this unit is not to make you a legal expert, but rather to help make you aware of the principles of contract and agency law that relate to acquisition.

As a COR, it is important for you to understand basic concepts of contracts and contract law because you are going to be involved in the day-to-day administration of Government contracts.

In addition, as a COR, you are an agent (representative) of the Contracting Officer (C O) in administering Government contracts. Therefore, it is important for you to understand the nature and limits of an agent’s authority.

WHAT IS A CONTRACTING OFFICER'S REPRESENTATIVE (COR)?

DEFINITION OF A COR

A Contracting Officer's Representative (COR) is an individual who is authorized to perform certain functions on behalf of the Contracting Officer. These functions are limited to those specifically delegated to him/her in writing by the Contracting Officer. Typically, a COR is also involved in the actions leading up to the award of the contract, as indicated below.

TYPICAL DUTIES OF THE COR

Generally, a COR performs the following functions:

- Defines the requirement.
- Prepares the Procurement Request Package.
- Assists in the solicitation or pre-award phase.
- Monitors the contractor's compliance with the terms and conditions of the contract.
- Performs inspection and acceptance of the contractor's work.
- Keeps the Contracting Officer apprised of any deficient performance by the contractor.
- Works with the Contracting Officer to resolve any technical issues arising under the contract.
- Ensures that the U.S. Government meets its obligations under the contract, e.g., providing Government-furnished property, access to work site.
- Performs final evaluation.

See Unit 2 for a more detailed discussion of the COR's duties and responsibilities.

WHAT IS A GOVERNMENT TECHNICAL MONITOR (GTM)?

DEFINITION OF A GTM

A Government Technical Monitor (GTM) is an individual designated by the Contracting Officer to assist the COR in monitoring a contractor's performance.

A Contracting Officer may designate a GTM to provide technical monitoring, advice, and assistance, to aid the COR in the monitoring and evaluating a contractor's performance. The most common reason for designating a GTM is physical proximity to the contractor's work site, although the Contracting Officer may designate a GTM because special skills or knowledge are necessary for the Government to monitor the contractor's work. A GTM may also be designated to represent the interests of another requirements office or post concerned with the contractor's work.

WHAT IS A CONTRACTING OFFICER (C O)?

DEFINITION OF A CONTRACTING OFFICER

A Contracting Officer is an individual authorized to enter into and administer contracts and make related determinations and findings. By definition, Contracting Officers, and *only* Contracting Officers, are authorized to enter into and modify contracts.

APPOINTMENT AND LIMITATIONS

The Procurement Executive appoints all Contracting Officers at the Department of State. A Contracting Officer is appointed in writing on a Standard Form 1402, "Certificate of Appointment." An individual must meet certain training and educational requirements to be appointed as a Contracting Officer.

No Contracting Officer has unlimited authority. All Contracting Officers have some legal and regulatory limitations on their authority; most have monetary limitations as well. These limitations must be clearly stated on the SF-1402. A Contracting Officer may bind the Government only to the extent of the authority delegated to him/her.

THE REGULATIONS

THE FEDERAL ACQUISITION REGULATION (FAR)

The Federal Acquisition Regulation (FAR) ([48 CFR Chapter 1](#)) is the regulation outlining the uniform policies, procedures, delegations of authority, systems, standards, and provisions that govern acquisition throughout the U.S. Government. It applies to all Federal agencies when they acquire supplies and services using appropriated funds.

THE DEPARTMENT OF STATE ACQUISITION REGULATION (DOSAR)

Federal departments and agencies are authorized to establish their own acquisition regulations to implement and supplement the FAR. Accordingly, the Department of State has established uniform policies and procedures in the Department of State Acquisition Regulation (DOSAR) [\[48 CFR Chapter 6\]](#).

WHAT IS A CONTRACT?

DEFINITION OF A CONTRACT

The FAR defines a contract as “a mutually binding legal relationship obligating the seller to furnish the supplies or services (including construction) and the buyer to pay for them.”

Put another way, a contract is an agreement between two or more parties that is enforceable by a court or other adjudicative body according to the terms of the contract.

The contract establishes the terms and conditions to which the parties agree, as well as their rights and duties under those terms and conditions.

ESSENTIAL CONTRACT ELEMENTS

To be enforceable, a contract must contain the following six elements:

1. There must be an **offer**.
2. There must be **acceptance** of that offer.
3. There must be valuable **consideration**.
4. The contract must have a **legal purpose**.
5. There must be a **clarity of terms and conditions**.
6. The parties must have the **legal capacity** to enter into the contract.

1. Offer

An offer is a demonstration of willingness to perform or a proposal to enter into a bargain.

The essential elements of an offer are:

- An expression of a present intent to enter into a contract;
- Definite and certain contract terms; and,

- Communication of the offer to the other party.

If these three elements are present, then the offeree (recipient of the offer) has the power to accept it and, in so doing, creates a contract.

2. Acceptance

Acceptance is an unconditional agreement with the terms of the offer. In U.S. Government contracting, once an offer is accepted, a binding contract is formed. Acceptance may occur in one of two ways, depending on the form of the offer:

Bilateral Acceptance. The bids or proposals submitted by the vendors are the offers. When the Government selects one vendor with which to contract, the Contracting Officer performs the act of acceptance when he/she countersigns the offer. Each party to the contract is then bound to the promises made.

Unilateral Acceptance. Under simplified acquisition procedures, the Government makes the offer to the vendor in the form of a purchase order. The vendor accepts the offer by substantial performance and no written acceptance is needed.

3. Consideration

Consideration is a legal term that refers to something of value (such as money) requested by the offeror in exchange for his/her promise to the offeree. To be valid, consideration must be legally sufficient; that is, it must have value in the eyes of the law. Both parties must receive consideration or a benefit from the performance of the contract.

Example: In a U.S. Government contract, the U.S. Government promises to pay an agreed-upon price when the contractor successfully completes the contract.

Consideration may also be in the form of refraining from doing something, such as refraining from suing or doing something that you are legally entitled to do. However, certain things cannot serve as consideration for a contract, such as promises to do illegal acts; promises of performance that has already occurred; or promises that include an “escape” clause that relieves the promisor from any required performance.

4. Legal Purpose

Each Federal agency has a mandate to carry out its specific missions and programs, and Congress appropriates funds to Federal agencies for that purpose. An agency can only issue contracts in support of its mission. For

instance, it would be illegal for the Department of State to contract for aircraft carriers to transport U.S. military personnel. That is the mission of the Department of Defense, not the Department of State.

5. Clarity of Terms and Conditions

The parties to a Federal contract agree on all the terms and conditions included in their prepared contract when they sign it. However, later during performance, the parties sometimes disagree as to the meanings of the contract language. As they try to resolve the disagreement, the parties, or a Court or Board, seeks the original “intent” of the parties with regard to the disputed language from the contract document or other sources. Usually the decision makers are able to discern the parties’ original intent and the contract is affirmed.

6. Legal Capacity

A person who agrees to a contract must have full legal capacity to become liable for duties under the contract. Capacity means the person has reached the age of majority and is of sound mind to appreciate the nature and extent of his/her acts.

A minor, a person who is mentally ill, or someone who is intoxicated does not have this capacity. The legal capacity of the parties to enter into a contract may determine whether a contract is valid or enforceable.

PRIVITY OF CONTRACT

Privity of contract means the legal relationship and responsibilities between parties to the same contract. In U.S. Government contracts, the Government has privity of contract with the prime contractor; the prime contractor has privity of contract with its first-tier subcontractors. However, the U.S. Government does not have privity of contract with subcontractors.

Example: The Government hires a construction firm (independent contractor) to build a parking garage, and that construction firm (independent contractor) hires an electrician (subcontractor) to wire the garage.

- *Is there privity between the U.S. Government and the independent contractor?*

The answer is “Yes.” The Government contracted directly with the construction firm.

- *Is there privity between the independent contractor and the subcontractor?*

The answer is “Yes.” The construction company contracted directly with the subcontractor.

- *Is there privity between the U.S. Government and the subcontractor?*

The answer is “No.” There is no contract between the U.S. Government and the subcontractor. Privity only exists between the U.S. Government and the independent contractor.

Therefore, the Government will normally deal with and be held liable for dealing with the prime contractor only. This means, for example, that if a subcontractor does not get paid for work in connection with a Government contract, the subcontractor generally cannot take action against the Government.

ACTUAL AUTHORITY VERSUS APPARENT AUTHORITY

ACTUAL AUTHORITY

It was mentioned earlier that both Contracting Officers and CORs are delegated specific authorities in writing (i.e., they have “express” authority). This delegation enables both individuals to act on behalf of the individuals who gave them the authority (the “principals”). A person who acts on behalf of the principal is an “agent.” In the case of the Contracting Officer, the Procurement Executive delegates to him/her the authority to negotiate and award contracts on behalf of the U.S. Government. In the case of the COR, the Contracting Officer delegates to him/her the authority to perform certain functions with respect to the contractor’s performance.

This is called *actual authority* and it means that the power delegated to an individual is certain, concrete, and not supposed or imaginary. The U.S. Government is bound only to the extent of the power it has actually given its agents, e.g., the COR and the Contracting Officer.

APPARENT AUTHORITY

An individual has apparent authority when the principal knowingly acts—or fails to act—in such a way that a third person would reasonably believe that the agent has the authority to perform the acts that he/she is doing. Most private sector company employees have *apparent authority*.

This means that a contractor will normally be bound by acts of its employees under the Doctrine of Apparent Authority, even though these employees may lack actual authority. For example, most people would accept that the president of a company has the authority to sign a contract on behalf of that company, even if that authority is not specifically described in a job description or some other document.

IMPLIED AUTHORITY

Apparent authority is not sufficient to hold the Government bound by the acts of its employees. However, courts and boards have frequently ruled in favor of contractors on the basis of *implied authority* when such authority is considered to be an integral part of the duties assigned to a Government employee. An agent has implied authority to do those things that are directly connected with and essential to the ordinary conduct and custom of the trade or business to which the agent has been designated.

Many of the litigated cases involving issues of authority center around implied authority. Most of these cases deal with CORs who, lacking authority to order changes, issue interpretations or give instructions that require the contractor to perform work beyond actual contract requirements. In such cases, the courts and boards have often held that the Government is responsible (and liable) when it is found that the Government acted to change the contract without going through the Contracting Officer (this is called a “constructive change”).

UNAUTHORIZED COMMITMENTS

DEFINITION OF UNAUTHORIZED COMMITMENT

The FAR defines an “unauthorized commitment” as an agreement that is not binding solely because the Government employee who made it lacked the authority to enter into that agreement on behalf of the Government.

An unauthorized commitment occurs when someone other than a warranted Contracting Officer commits the U.S. Government to a contractual action, such as directing a contractor to perform work or deliver items. This also includes cases where a contractor is asked to continue performance under an existing contract without adequate funding. Only a warranted Contracting Officer may bind the U.S. Government contractually.

Unauthorized commitments may result in personal liability for the individual who made the commitment. Department personnel responsible for

unauthorized commitments must provide detailed written explanations of their actions and may be subject to disciplinary action, especially if violations are flagrant and/or continuous.

In addition, contractors who act on unauthorized commitments do so at their own risk. They are not entitled to consideration (money) unless and until the unauthorized commitment is ratified. Payment is therefore substantially delayed or may not be forthcoming at all if the action is not ratified.

RATIFICATION OF UNAUTHORIZED COMMITMENTS

Ratification is the process whereby designated individuals convert an unauthorized commitment to a legal contract.

WHO MAY RATIFY

At the Department, only the heads of the contracting activities may ratify actions up to \$1,000; the Procurement Executive must ratify actions exceeding \$1,000. (See [DOSAR 601.603-70](#) for the list of heads of contracting activities.)

The authority to ratify an unauthorized commitment, however, has certain limitations. Ratification may occur only when all of the following conditions are met:

- The supplies or services have been provided to and accepted by the U.S. Government, or the U.S. Government otherwise has obtained or will obtain a benefit;
- The resulting contract would otherwise have been proper if made by a warranted Contracting Officer;
- The price is determined to be fair and reasonable;
- The Contracting Officer recommends payment (he or she may request concurrence from the Office of the Legal Advisor (L / B A) if there is a question of propriety or a legal issue);
- Funds are available and were available at the time the unauthorized commitment was made; and
- All requirements of Department of State Acquisition Regulation ([DOSAR 601.602-3-70](#)) for documentation and explanation of unauthorized commitments have been met. That process is described below.

PROCEDURES FOR RATIFICATION

The ratification process is onerous, and for a good reason. Unauthorized commitments violate Federal law and Department acquisition regulations and carry severe negative consequences for all parties.

1. The individual who made the unauthorized commitment submits all records and documents concerning the unauthorized commitment to the Contracting Officer. That individual must provide a complete written, signed statement of the facts, including why normal acquisition procedures were not followed, why and how the vendor was selected, a list of other sources considered, a description of work or products, a statement regarding the status of performance, an estimated or agreed price, certified funding citations, and a statement as to why he/she should not be personally liable for the cost, e.g., that a public purpose was served and no personal benefit was received.

If the individual who made the unauthorized commitment is no longer available to attest to the circumstances, an officer from the responsible office provides the documentation; the statement must identify the individual responsible for the unauthorized commitment.

In addition, a cognizant management official from the office that employed the individual who made the unauthorized commitment at the time the unauthorized commitment was made provides a statement detailing actions that he/she will take to ensure that such commitments will not occur again under the same or similar circumstances.

2. The Contracting Officer reviews the documentation and prepares a recommendation to the ratifying official. The Contracting Officer either recommends approval or disapproves the ratification of the unauthorized commitment.
3. The Contracting Officer submits the complete file to the ratifying official for review and determination.
4. If the ratifying official ratifies the unauthorized commitment, the file is returned to the Contracting Officer for issuance of the appropriate contractual document(s). If the request for ratification is not justified, the ratifying official returns the request to the head of the contracting activity (if over \$1,000) or to the Contracting Officer (if under \$1,000) with a written explanation for the decision and a recommendation for disposition of the action.

5. If the ratification is approved, the ratifying official prepares a letter to the contractor involved in the ratification. The letter states the reason(s) why the ratification was approved and provides cautionary language to the contractor regarding future instances of ratification actions.
6. If the ratification is not approved, the head of the contracting activity prepares a letter to the contractor advising that the ratification was not approved. The letter cites the reason(s) for the disapproval.

UNIT 1 REVIEW EXERCISES

Answer the following questions then check your answers against the ones in the [Answers](#) section.

1. Typically, the COR's responsibilities do not begin until after the contract has been awarded.

True

False

2. Mark the appropriate cells:

Which set(s) of regulations...	FAR	DOSAR
Applies to DOS CORs?		
Applies to DOS Contracting Officers?		
Applies to acquisition personnel of any Federal agency?		
Implements and supplements the other?		

3. Which of the following are essential elements of a contract?
 - (a) It must be in writing.
 - (b) There must be an offer.
 - (c) There must be acceptance of that offer.
 - (d) The acceptance must be unilateral.
 - (e) There must be valuable consideration.
 - (f) The contract must have a legal purpose.
 - (g) There must be a clarity of terms and conditions.
 - (h) The parties must have the legal capacity to enter into the contract.
 - (i) There must be an exchange of money.

4. Column I contains a list of definitions; Column II contains a list of terms. On the line to the left of each definition in Column I, write the letter of the term in Column II that best fits the definition. Each response in Column II may be used once, more than once, or not at all.

Column I**Column II**

- | | |
|--|----------------------------|
| _____ (1) The power delegated by a principal to an agent that is certain, concrete, and is not supposed or imaginary. | A. Ratification |
| _____ (2) The person who is authorized by the Government to enter into and modify contracts. | B. Privity of contract |
| _____ (3) The legal relationship and responsibilities between parties to the same contract. | C. Actual authority |
| _____ (4) The process whereby designated individuals convert an unauthorized commitment to a legal contract. | D. Independent contractor |
| _____ (5) An agreement that is not binding solely because the Government employee who made it lacked the authority to enter into that agreement on behalf of the Government. | E. Subcontractor |
| _____ (6) A demonstration of willingness to perform or a proposal to enter into a bargain. | F. COR |
| | G. Contracting Officer |
| | H. Apparent authority |
| | I. Offer |
| | J. Unauthorized Commitment |

5. The general rule of agency is that a principal is not liable for the acts of his/her agent that are performed within the limits of the agent's actual authority.

True

False

6. The Government cannot be held liable for acts of employees who lack actual authority.

True

False

7. Unauthorized commitments may result in personal liability for the individual who made the commitment.

True

False

UNIT 1 EXERCISE ANSWERS

1. **FALSE.** Explanation: Typically, a COR is also involved in the actions leading up to the award of the contract. (See Page 1-2.)
2. Mark the appropriate cells:

Which set(s) of regulations...	FAR	DOSAR
Applies to DOS CORs?	X	X
Applies to DOS Contracting Officers?	X	X
Applies to acquisition personnel of any Federal agency?	X	
Implements and supplements the other?		X

(See Page 1-3)

3. The six essential elements of an enforceable contract are—
 - (b) There must be an offer;
 - (c) There must be acceptance of that offer;
 - (d) There must be valuable consideration (although not necessarily an exchange of money);
 - (e) The contract must have a legal purpose;
 - (f) There must be a clarity of terms and conditions; and,
 - (g) The parties must have the legal capacity to enter into the contract.

See Page 1-4.

4. The answers in Column I are as follows.
 - (1) **C.** The power delegated by a principal to an agent that is certain, concrete, and is not supposed or imaginary is actual authority. (See Page 1-7.)

- (2) **G.** The person who is authorized by the Government to enter into and modify contracts is the Contracting Officer. (See Page 1-3.)
- (3) **B.** The legal relationship and responsibilities between parties to the same contract is privity of contract. (See Page 1-6.)
- (4) **A.** The process whereby designated individuals convert an unauthorized commitment to a legal contract is ratification. (See Page 1-9.)
- (5) **J.** (See Page 1-4.)
- (6) **I.** A demonstration of willingness to perform or a proposal to enter into a bargain is an offer. (See Page 1-4.)
- 5. **FALSE.** Explanation: The general rule is that a principal is liable for the acts of his/her agent that are performed within the limits of the agent's actual or apparent authority. (See Page 1-7.)
- 6. **FALSE.** Explanation: The courts and boards have often held that the Government is responsible (and liable) when it is found that the Government acted to change the contract on the basis of implied authority (this is called a "constructive change"). (See Page 1-8.)
- 7. **TRUE.** Explanation: Unauthorized commitments may result in personal liability for the individual who made the commitment. Department personnel responsible for unauthorized commitments must provide detailed written explanations of their actions and may be subject to disciplinary action, especially if violations are flagrant and/or continuous. (See Page 1-8)

UNIT 1 SUMMARY

The following basic terms and concepts are discussed in this unit.

- Contracting Officer Representative (COR): See Page [1-2](#).
- Government Technical Monitor (GTM): See Page [1-2](#).
- Contracting Officer (C O): See Page [1-3](#).
- Federal Acquisition Regulation (FAR): See Page [1-3](#).
- Department of State Acquisition Regulations (DOSAR): See Page [1-4](#).
- Contracts: See Page [1-4](#).
- Elements of a contract: See Page [1-4](#).
- Actual Authority: See Page [1-7](#).
- Apparent Authority: See Page [1-7](#).
- Privity of Contract: See Page [1-6](#).
- Unauthorized Commitment: See Page [1-8](#).

REMINDERS TO CORs

As a COR, you should remember the following points:

- **DO** keep readily available a copy of each contract for which you have any Contracting Officer-designated responsibilities, including a copy of any change or modification in those contracts.
- **DO** immediately become familiar with (and remain up-to-date on) the terms, conditions, and requirements of any contract for which you have Contracting Officer-designated responsibility.
- **DO** remember that, as an agent of the Contracting Officer, you must act strictly within the limits of your Contracting Officer-designated authority.

UNIT 2 — COR AUTHORITY

UNIT OBJECTIVES

AFTER READING THE MATERIAL AND COMPLETING THE REVIEW EXERCISES, YOU WILL BE ABLE TO—

- Identify the basic source and limitations of a COR's authority;
- List the responsibilities of the COR;
- List the responsibilities of the Contracting Officer;
- List the training requirements of a COR;
- List the contents of the COR Letter of Designation;
- List the procedures by which CORs are nominated and appointed;
- Identify the prohibition against "inheriting" COR authority from another individual;
- Identify activities the COR may not engage in with the contractor; and
- Identify the means by which a COR designation must be terminated.

IMPORTANCE OF UNIT TO COR

As a COR, one of the most important things to know about your job is the nature and extent of the authority that is delegated to you. The basic source and limitations of a COR's authority is contained in his or her Letter of Designation (appointment), which is issued by the Contracting Officer. To fill the position of a COR, you must know not only what to do and when, but also what you *cannot* do as a COR.

UNIT OVERVIEW

The responsibilities of a COR are diverse. The position may be full-time or part-time, with several contracts to monitor or perhaps just a portion of one. The

COR may have extensive authority to administer a contract or, at times, very little. There is no stereotypical COR, just as there is no mold for a Contracting Officer. The COR function depends on the authority delegated to him or her by the Contracting Officer.

In this unit, we will discuss the source and limitations of COR authority.

CONTRACTING OFFICER'S JOB

Contracting Officers delegate authority and responsibilities to CORs. To understand the nature and extent of a COR's authority, you must first understand the Contracting Officer's authority and responsibility.

FAR DEFINITION OF CONTRACTING OFFICER

The Federal Acquisition Regulation (FAR) [2.101](#) defines "Contracting Officer" as "a person with the authority to enter into, administer, and/or terminate contracts and make related determinations and findings. The term includes certain *authorized representatives of the contracting officer*¹ acting within the limits of their authority as delegated by the contracting officer...."

At the Department of State, the Procurement Executive appoints Contracting Officers.

CONTRACTING OFFICER RESPONSIBILITIES

The *COR Handbook* ([6 FAH-2 H-141](#)) describes the responsibilities of the Contracting Officer as follows.

The Contracting Officer is the U.S. Government's authorized agent for dealing with contractors and has sole authority to solicit proposals, negotiate, award, and modify contracts on behalf of the U.S. Government. The Contracting Officer performs duties at the request of the requirements office and relies on the requirements office for technical advice concerning the supplies or services being acquired.

The Contracting Officer is responsible for the following functions:

- (1) Determining the method of acquisition and the type of contract to be used.

¹ Italics added.

- (2) Preparing any required “Determination(s) and Findings” and ensuring that any necessary FAR deviations and exemptions have been obtained.
- (3) Establishing the contract terms, conditions, and general provisions, including the methods of pricing, paying, and financing.
- (4) Appointing the Contracting Officer’s Representative (COR), who will have limited authority to act for the Contracting Officer.
- (5) Appointing individuals to participate on the Technical Evaluation Panel.
- (6) Issuing the solicitation, including the review and approval from A / O P E if required (overseas only); post on the GPE (FedBizOpps), and/or local advertising; and developing the solicitation mailing list.
- (7) Conducting contract negotiations, with the assistance of technical experts, if necessary.
- (8) Executing (signing) the contract on behalf of the U.S. Government.
- (9) Conducting debriefings of unsuccessful offerors.
- (10) Administering the contract, including the execution of contract modifications and other changes.
- (11) Closing out or terminating contracts.
- (12) Rendering final decisions regarding protests, claims, and disputes.

CONTRACTING OFFICER AUTHORITY

Contracting Officers “have authority to enter into, administer, or terminate contracts and make related determinations and findings. Contracting Officers may bind the Government only to the extent of the authority delegated to them. Contracting Officers shall receive from the appointing authority ... clear instructions in writing regarding the limits of their authority.” [\(FAR 1.602-1\(a\)\)](#)

A Contracting Officer has *broad* authority. On the other hand, CORs have *limited authority*.

FAR AND DOSAR DEFINITIONS OF A COR

The FAR does not specifically discuss the COR. But, as we just saw, the definition of Contracting Officer “...includes certain authorized representatives of the contracting officer acting within the limits of their authority as delegated by the contracting officer.” (FAR 2.101) This can mean many different positions, one of which may be a COR.

The Department of State Acquisition Regulation describes the COR as someone who acts as the Contracting Officer’s authorized representative to assist in the administration of contracts (DOSAR 642.270(a)).

QUALIFICATIONS OF A COR

GENERAL QUALIFICATIONS

Contracting Officers “may designate *technically qualified* personnel as their authorized representatives to assist in the administration of contracts. The COR must be a *U.S. Government employee*.” (DOSAR 642.270(a))

TRAINING REQUIREMENTS FOR A COR

The *COR Handbook* describes the training requirements for a COR (6 FAH-2 H-143.1):

a. Domestic CORs

- (1) A COR appointed by a domestic contracting activity must have completed an FSI-approved COR training course. Approved courses are: (i) COR Training, 3 days (P A-174); (ii) COR Training, 2 days (P A-175); (iii) COR Update Training, 1 day (P A-173); and (iv) How to be a COR, correspondence course (P A-296).
- (2) If FSI training courses are unavailable, training may be obtained from other U.S. Government or commercial sources; however, the course must be 40 hours in length and cover at least the basic duties. Every five (5) years thereafter, the COR must complete an additional FSI-approved course or other 40-hour course in order to maintain a current base of knowledge. A COR shall also complete the 1-day refresher course in the intervening period; this course is offered by FSI.

- (3) FSI is the preferred source of COR training, and inquiries regarding COR training should be directed to FSI. Funding may not be available for a sufficient number of courses, so CORs may have to obtain training from a commercial source or other Federal agencies. Refer to the [A / O P E web page](#).
 - (4) Department employees who are already serving as CORs need not complete the required training if, in the judgment of the Contracting Officer, their performance as a COR is acceptable. If the Contracting Officer considers a current COR's performance to be in need of improvement, the COR may be required to complete the required training within one year as a condition of continuing to serve as a COR. Department employees may substitute one or more years of experience for the initial training requirement if approved by the Contracting Officer based on the adequacy of the experience.
 - (5) Appointment of a COR is entirely within the discretion of the Contracting Officer. A COR's training and relevant qualifications and/or experience do not guarantee that he or she will be appointed.
- b. Training requirements for CORs abroad: COR training is not mandatory for CORs assigned abroad; however, it is highly recommended.

APPOINTMENT OF CORS

The *COR Handbook* describes the appointment procedures for CORs ([6 FAH-2 H-143.2](#)).

NOMINATION

The COR is nominated by the requirements office, using the COR nomination form. The nomination form should be completed and included in the procurement request package, but the COR can also be nominated at a later date. The nomination is either approved or disapproved by the Contracting Officer.

If the Contracting Officer approves the COR nomination, he or she prepares a Form DS-1924 (Certificate of Appointment) and an accompanying delegation memorandum, also called a Letter of Designation.

DESIGNATION

[DOSAR 642.270\(a\)](#) states that each designation of a COR must be in writing and must define the scope and limitations of the COR's authority. The designation memorandum is important because it outlines the scope of the COR's authority, duties, responsibilities, and prohibitions.

The Letter of Designation is the one thing that makes each COR unique. Each COR position is somewhat different, depending upon the nature and extent of authority that the COR is given in the Letter of Designation.

CONTENTS OF THE LETTER OF DESIGNATION

At a minimum, the COR Letter of Designation must contain the following information:

1. The names of the COR and the Contracting Officer.
2. The contract number.
3. The specific areas of COR authority and responsibility.
4. The specific limitation on COR authority.
5. A specific statement that such authority is not delegable by the COR.
6. Detailed description of—
 - The types of files to maintain,
 - The contents of the files, and
 - The distribution of the file contents.
7. An acknowledgment of receipt of the letter.

If a COR is to act for the Contracting Officer on more than one contract, a separate designation must be issued for each contract.

An example of a COR Letter of Designation is shown in [Exhibit 2-1](#) on page [2-17](#).

DISTRIBUTION OF LETTERS OF DESIGNATION

The Contracting Officer is required by [DOSAR 642.270\(a\)](#) to furnish copies of each COR Letter of Designation to the COR (in addition to the original) and the contractor. The Contracting Officer is also required to furnish copies to the requirements office, payments offices, each contract administration officer concerned, and to any other Government official as necessary.

The memorandum should be signed as acknowledged by the COR and countersigned by the contractor to show the mutual understanding of the COR's authority.

COR RESPONSIBILITIES

The *COR Handbook* (6 FAH-2 H-142) describes the responsibilities of the COR as follows.

...The functions listed below are performed by someone in the requirements office, whether it is the COR or not. For administrative convenience, all functions listed will be referred to as COR functions.

The COR is responsible for the following functions:

- (1) Defining project requirements and developing a Statement of Work (SOW) or specifications.
- (2) Assisting in conducting market research.
- (3) Initiating, developing, and transmitting a complete Procurement Request Package (PRP) to the contracting office, with all required administrative approvals.
- (4) Obtaining certification of the availability of sufficient funds from the proper appropriation and compiling any other required financial data.
- (5) Obtaining appropriate justification for other than full and open competitive acquisitions, if necessary.
- (6) If serving as Chairperson of the Technical Evaluation Panel, participating in and directing the evaluation of the technical proposals for negotiated procurement and providing recommendations to the Contracting Officer.
- (7) Assisting the Contracting Officer during discussions/negotiations.
- (8) Monitoring the contractor's technical progress and the expenditures of resources relating to the contract.
- (9) Performing inspection and accepting the work on behalf of the U.S. Government.

- (10) Informing the Contracting Officer, in writing, of any performance or schedule failure by the contractor.
- (11) Resolving technical issues arising under the contract which fall within the scope of the COR's authority, and referring to the Contracting Officer any issues which cannot be resolved without additional cost or time.
- (12) Informing the Contracting Officer, in writing, of any needed changes in the Statement of Work.
- (13) Ensuring that the U.S. Government meets its contractual obligations to the contractor, e.g., providing Government furnished equipment and services and timely Government review and approval of documents if such reviews are required by the contract.
- (14) Reporting costs being incurred which are not appropriately chargeable to the contract (cost-type contracts only).
- (15) Maintaining a COR file.
- (16) Verifying contractor statements regarding the development of patentable inventions, if required under the contract.
- (17) Assisting in contract closeout by informing the Contracting Officer when the work has been completed and by forwarding contract administration records to the Contracting Officer.

COR AUTHORITY LIMITATIONS

“The contracting officer shall designate the COR in writing; the designation shall define the scope and limitations of the COR's authority ... The COR does not have the authority to make any commitments or changes that will affect the price, quality, quantity, or delivery terms of a contract; in order to do so, or to otherwise commit or bind the Government, a valid contracting officer warrant is required.” [\(DOSAR 642.270\(a\)\)](#)

NOTE: A COR does *not* have the authority to delegate his/her responsibilities.

A COR cannot “inherit” the authority of another COR who previously held that position. Each COR must have his/her own specific Letter of Designation.

A COR *MAY NOT*

- Award, agree to, or sign any contract or modification to a contract.
- Direct the contractor to undertake any activity that will change—
 - The total price or estimated cost;
 - Products or deliverables;
 - Statement of Work;
 - Delivery dates;
 - Total period of performance; or
 - Administrative provisions of the contract.

DURATION OF COR STATUS

The designation of a particular COR for a contract is effective through the life of the contract unless—

- The Contracting Officer (or Contracting Officer's successor) revokes the designation before the end of the contract, or
- The COR designation is revoked by the reassignment of the designated individual.

CHANGING COR STATUS

Changes in scope and limitation of COR authority may be made either by—

- Issuing a new COR Letter of Designation, or
- Amending an existing designation.

The termination of a COR designation must—

- Be in writing, and
- State the date on which the termination is effective.

UNIT 2 REVIEW EXERCISES

Answer the following questions. Then, check your answers against the ones in the [Answers](#) section.

1. The basic source and limitations of a COR's authority are found in the—
 - a. Contract
 - b. Letter of Designation
 - c. Agency head
 - d. Certificate of Appointment
2. Which of the following is not a minimum content requirement of a COR Letter of Designation?
 - a. Contract number
 - b. Acknowledgment of receipt of the letter
 - c. Specific limitation(s) on COR authority
 - d. Notary public seal
3. The contractor does not receive a copy of the COR's Letter of Designation.
True False
4. A COR may redelegate his/her authority to another individual.
True False

5. The functions listed below are performed by someone in the requirements office during the acquisition cycle. Which ones does the COR have responsibility for? (Source: *COR Handbook* (6 FAH-2 H-141)).

The person responsible for this is....	Typically the COR	Not typically the COR	Never the COR
Defining project requirements			
Assisting in conducting market research			
Appointing a person who will have limited authority to act for the Contracting Officer			
Obtaining certification of the availability of sufficient funds from the proper appropriation and compiling any other required financial data			
Developing a Statement of Work (SOW) or specifications			
Obtaining required administrative approvals for the Procurement Request Package (PRP)			
Initiating, developing, and transmitting a complete PRP to the contracting office			
Establishing the contract terms, conditions, and general provisions			
Determining the method of acquisition and the type of contract to be used			
Obtaining appropriate justification for other than full and open competitive acquisitions, if necessary			
Posting the solicitation to the Governmentwide Point of Entry (FedbizOpps)			
Serving as Chairperson of the Technical Evaluation Panel			
Appointing individuals to participate on the Technical Evaluation Panel			
Participating in and directing the evaluation of the technical proposals			
Recommending contractor selection			
Conducting contract negotiations			
Assisting during discussions/negotiations			
Executing (signing) the contract on behalf of the U.S. Government			
Conducting debriefings of unsuccessful offerors			
Providing Government furnished equipment and services required by the contract			
Assisting in debriefing unsuccessful offerors			

The person responsible for this is....	Typically the COR	Not typically the COR	Never the COR
Recommending appointment of the Government Technical Monitor (GTM)			
Appointing a GTM			
Monitoring the contractor's technical progress			
Monitoring the contractor's expenditures of resources relating to cost-type contracts			
Performing inspection and accepting the work on behalf of the U.S. Government			
Providing timely Government review and approval of documents if such reviews are required by the contract			
For cost-type contracts, reporting costs being incurred which are not appropriately chargeable to the contract			
Reporting, in writing, any needed changes in the Statement of Work			
Executing contract modifications and other changes			
Reporting in writing any performance or schedule failure by the contractor			
Resolving technical issues arising under the contract that fall within the scope of his or her authority			
Referring any issues arising under the contract that cannot be resolved without additional cost or time			
Rendering final decisions regarding protests, claims, and disputes			
Maintaining a COR file			
Ensuring that the U.S. Government meets its contractual obligations to the contractor			
Reporting when the work has been completed			
Verifying contractor statements regarding the development of patentable inventions, if required under the contract			
Closing out or terminating contracts			

UNIT 2 EXERCISE ANSWERS

1. The basic source and limitations of a COR's authority are found in the (Circle the letter of the correct answer)
 - a. Contract
 - B. LETTER OF DESIGNATION (See Page 2-6.)**
 - c. Agency head
 - d. Certificate of Appointment
2. Which of the following is not a minimum content requirement of a COR Letter of Designation? (Circle the letter of the correct answer)
 - a. Contract number
 - b. Acknowledgment of receipt of the letter
 - c. Specific limitation(s) on COR authority
 - D. NOTARY PUBLIC SEAL (See Page 2-6.)**
3. **FALSE.** Explanation: The contractor *does* receive a copy of the COR's Letter of Designation. (See Page 2-6.)
4. **FALSE.** Explanation: A COR may *NOT* redelegate his/her authority to another individual. (See Page 2-8.)

5. The functions listed below are performed by someone in the requirements office during the acquisition cycle. Which ones does the COR have responsibility for? (Source: *COR Handbook* (6 FAH-2 H-141). See Page 2-20.)

The person responsible for this is....	Typically the COR	Not typically the COR	Never the COR
Defining project requirements	X		
Assisting in conducting market research	X		
Appointing a person who will have limited authority to act for the Contracting Officer			X
Obtaining certification of the availability of sufficient funds from the proper appropriation and compiling any other required financial data	X		
Developing a Statement of Work (SOW) or specifications	X		
Obtaining required administrative approvals for the Procurement Request Package (PRP)	X		
Initiating, developing, and transmitting a complete PRP to the contracting office	X		
Establishing the contract terms, conditions, and general provisions		X	
Determining the method of acquisition and the type of contract to be used		X	
Obtaining appropriate justification for other than full and open competitive acquisitions, if necessary	X		
Posting the solicitation to the Governmentwide Point of Entry (FedbizOpps)		X	
Serving as Chairperson of the Technical Evaluation Panel	X		
Appointing individuals to participate on the Technical Evaluation Panel			X
Participating in and directing the evaluation of the technical proposals	X		
Recommending contractor selection	X		
Conducting contract negotiations			X
Assisting during discussions/negotiations	X		
Executing (signing) the contract on behalf of the U.S. Government			X
Conducting debriefings of unsuccessful offerors		X	

The person responsible for this is....	Typically the COR	Not typically the COR	Never the COR
Providing Government furnished equipment and services required by the contract	X		
Assisting in debriefing unsuccessful offerors	X		
Recommending appointment of the Government Technical Monitor (GTM)	X		
Appointing a GTM			X
Monitoring the contractor's technical progress	X		
Monitoring the contractor's expenditures of resources relating to cost-type contracts	X		
Performing inspection and accepting the work on behalf of the U.S. Government	X		
Providing timely Government review and approval of documents if such reviews are required by the contract	X		
For cost-type contracts, reporting costs being incurred which are not appropriately chargeable to the contract	X		
Reporting, in writing, any needed changes in the Statement of Work	X		
Executing contract modifications and other changes			X
Reporting in writing any performance or schedule failure by the contractor	X		
Resolving technical issues arising under the contract that fall within the scope of his or her authority	X		
Referring any issues arising under the contract that cannot be resolved without additional cost or time	X		
Rendering final decisions regarding protests, claims, and disputes			X
Maintaining a COR file	X		
Ensuring that the U.S. Government meets its contractual obligations to the contractor	X		
Reporting when the work has been completed	X		
Verifying contractor statements regarding the development of patentable inventions, if required under the contract	X		
Closing out or terminating contracts			X

UNIT 2 SUMMARY

Only Contracting Officers may enter into and sign contracts on behalf of the Government. Contracting Officers have broad authority to enter into, administer, or terminate contracts.

A COR is the authorized representative, or agent, of the Contracting Officer. Which authorities and responsibilities a Contracting Officer delegates to the COR varies, making each COR position unique. A Letter of Designation clearly defines the scope and limitations of the particular COR's authority.

CORs have limited authority. The COR is always prohibited from making any commitments or changes that will affect the price, quality, quantity, or delivery terms of a contract.

The COR is prohibited from redelegating his or her COR authority. A COR cannot “inherit” the authority of another COR who was previously in that position. Each COR must have a Letter of Designation specific to a contract.

[Exhibit 2-2](#) on page [2-20](#) shows the responsibilities of Contracting Officers and CORs.

REMINDERS TO CORs

As a COR, you should remember the following points:

- **DO** keep a copy of your Letter of Designation.
- **DO** be sure that you understand it completely.
- **DO** understand the limits of your COR authority.
- **DO NOT** exceed your authority as expressed and limited in your Letter of Designation.

EXHIBIT 2-1: SAMPLE COR DESIGNATION MEMORANDUM

MEMORANDUM TO: [Insert Name of Contracting Officer's Representative]
FROM: [Insert Name of Contracting Officer]
SUBJECT: Delegation of Authority Under Contract No. [Insert Number]
DATE: [Insert Date]

Pursuant to the authority granted to me as a Contracting Officer under the Federal Acquisition Regulation (FAR), you are hereby designated the Contracting Officer's Representative with respect to technical matters within the scope of Contract Number [insert number] that has been issued to [insert name of contractor].

Please note that this delegation does not include the right to—

- (1) Modify or alter the contract or any of its terms and conditions;
- (2) Waive the U.S. Government's rights with regard to the Contractor's compliance with the specifications, price, delivery, or any other terms or conditions; or
- (3) Approve any actions that would result in additional charges to the U.S. Government.

All such actions must be made in writing by the Contracting Officer. This delegation authorizes you to perform the tasks listed below to the extent required by the terms of the contract.

- (1) Coordinate with the contractor on all technical matters that may arise in the administration of this contract.
- (2) Give procedural clarification as to the meaning of the specifications including inspection, testing and acceptance procedures.
- (3) Monitor and inspect the Contractor's progress and performance to assure compliance with the contract terms and conditions.
- (4) Receive deliverables (supplies, services, and/or reports) on behalf of the U.S. Government.
- (5) Verify satisfactory delivery of contract items and prepare receiving reports and/or approve invoices for payment.
- (6) If progress payments are approved under this contract, verify efficient and satisfactory performance of work by the Contractor and authorize progress payments.

- (7) If this contract contains a warranty or maintenance clause, notify the Contracting Officer and Contractor of any deficiencies in workmanship or materials immediately and monitor response and repair times as stipulated in the contract.

In exercise of this authority as Contracting Officer's Representative, you are responsible for:

- (1) Performing the specific duties assigned herein.
 - (a) With regard to monitoring and inspecting the Contractor's progress and performance, you must promptly notify the Contracting Officer in writing of any noncompliance or deviation in performance or failure to make progress.
 - (b) With regard to preparing receiving reports and/or approving invoices for payment, you must execute these documents promptly and transmit them to the designated payments office within five calendar days. Delays in processing receiving reports and/or invoices may cause late payment by the U.S. Government and the incurrence of interest charges.
- (2) Maintaining constant cognizance with respect to technical compliance with contract terms on the part of the Contractor.
- (3) Knowing and understanding the terms and provisions of the contract.
- (4) Knowing the scope and limitations of your authority.
- (5) Using good judgment, skill and reasonable care in the exercise of your authority.
- (6) Protecting privileged and sensitive procurement information.
- (7) If appropriate, periodically visiting the Contractor's plant to check on the following aspects and informing the Contracting Officer of your findings through submission of a trip report prepared in accordance with your office's internal procedures:
 - (a) Actual performance versus scheduled performance.
 - (b) Action needed, if any, to restore contract schedule.
- (8) If applicable, implementing the Government Furnished Property (GFP) provisions of the contract. COR responsibilities with regard to GFP include:
 - (a) Preparing itemized list of GFP showing serial numbers, if any, and approximate value of each item;
 - (b) Providing the Contracting Officer with the GFP list and Contractor receipts for GFP;
 - (c) Ensuring that delivery of the GFP to the Contractor is made in accordance with the contract; and

- (d) Inspecting each unit of GFP upon its return from the Contractor and notifying the Contracting Officer of such return and/or any deficiencies.
- (9) Performing all acceptance tests required by the contract in accordance with the time limitation stated therein. The results of the acceptance tests must be forwarded to the Contracting Officer.
- (10) Upon completion of the contract, preparing a statement of satisfactory performance or a statement of any deviations, shortages or deficiencies. In addition to this written statement, the COR must submit a completed form DS 1771 - Contractor Evaluation Statement (attached) to the Contracting Officer.

If you believe the delivered supplies or services should be rejected, the Contracting Officer should be notified immediately and you should follow up in writing with a brief memorandum documenting the reasons for rejection.

If questions arise which are not clearly answered in the contract (including the specifications) or if disputes with the Contractor occur, a written report to the Contracting Officer shall be prepared setting forth the problem encountered. This delegation of authority is limited to the referenced contract and is not subject to redelegation by you. The delegation may be terminated at any time by written notice from the Contracting Officer if you are transferred from your present position or are prevented from continuing as COR for the referenced contract.

Receipt Acknowledged:

_____ Date: _____

Attachments: 1. Contract Number **[insert contract number]**

cc: (1) Contractor (2) Finance Office (3) Contract File

EXHIBIT 2-2: CONTRACTING OFFICER AND COR RESPONSIBILITIES

Source: *COR Handbook* (6 FAH-2 H-141). The functions listed below are performed by someone during the acquisition cycle. This table shows how the responsibilities are typically divided.

Contracting Officer	COR
Determining the method of acquisition and the type of contract to be used	Defining project requirements and developing a Statement of Work (SOW) or specifications
Preparing any required “Determination(s) and Findings” and ensuring that any necessary FAR deviations and exemptions have been obtained	Conduct market research for acquisitions exceeding \$100,000 when developing new requirements documents
Establishing the contract terms, conditions, and general provisions, including the methods of pricing, paying, and financing	Initiating, developing, and transmitting a complete Procurement Request Package (PRP) to the contracting office, with all required administrative approvals
Appointing the Contracting Officer’s Representative (COR), who will have limited authority to act for the Contracting Officer	Obtaining certification of the availability of sufficient funds from the proper appropriation and compiling any other required financial data
Appointing individuals to participate on the Technical Evaluation Panel	Obtaining appropriate justification for other than full and open competitive acquisitions, if necessary
Conduct market research for acquisitions exceeding \$100,000 before issuing the solicitation	If serving as Chairperson of the Technical Evaluation Panel, participating in and directing the evaluation of the technical proposals for negotiated procurement and providing recommendations to the Contracting Officer
Issuing the solicitation, including the review and approval from A / O P E if required (overseas only); posting on the Governmentwide Point of Entry (FedbizOpps), if required, and/or local advertising; and developing the solicitation mailing list;	
Conducting contract negotiations, with the assistance of technical experts, if necessary	Assisting the Contracting Officer during discussions/negotiations
Executing (signing) the contract on behalf of the U.S. Government	
Conducting debriefings of unsuccessful offerors	Assisting the Contracting Officer in debriefing unsuccessful offerors

Contracting Officer	COR
Appointing a Government Technical Monitor (GTM) to assist the COR in monitoring the contract.	Recommending appointment of the GTM
Administering the contract, including the execution of contract modifications and other changes	Monitoring the contractor's technical progress and the expenditures of resources relating to the contract
	Performing inspection and accepting the work on behalf of the U.S. Government
	Informing the Contracting Officer, in writing, of any performance or schedule failure by the contractor
	Resolving technical issues arising under the contract which fall within the scope of the COR's authority, and referring to the Contracting Officer any issues which cannot be resolved without additional cost or time
	Informing the Contracting Officer, in writing, of any needed changes in the Statement of Work
	Ensuring that the U.S. Government meets its contractual obligations to the contractor, e.g., providing Government furnished equipment and services and timely Government review and approval of documents if such reviews are required by the contract
	Reporting costs being incurred which are not appropriately chargeable to the contract (cost-type contracts only)
	Maintaining a COR file
Closing out or terminating contracts	Verifying contractor statements regarding the development of patentable inventions, if required under the contract
Rendering final decisions regarding protests, claims, and disputes.	Assisting in contract closeout by informing the Contracting Officer when the work has been completed

UNIT 3 — PRE-AWARD FUNCTIONS

UNIT OBJECTIVES

AFTER READING THE MATERIAL AND COMPLETING THE REVIEW EXERCISES, YOU WILL BE ABLE TO—

- Identify the different methods of acquisition;
- List kinds of market research information, their sources and uses;
- List the contents of a Procurement Request Package (PRP);
- Identify the kinds of solicitation documents and what they contain;
- List the basic steps by which technical proposals are evaluated; and
- Identify COR responsibilities and functions during the pre-award phase of an acquisition.

IMPORTANCE OF UNIT TO COR

The things that are done before the contract is ever awarded affect the likelihood of success or failure of the whole acquisition. You will need an understanding of general pre-award processes and activities because a COR may be asked to assist the Contracting Officer in various ways during the initial phase of the acquisition.

METHODS OF ACQUISITION

There are two basic methods of acquiring goods and services for the Government. The first is through **existing and required sources** of supply and services. The second is an **open market** acquisition using either simplified acquisition techniques or formal contracting methods.

REQUIRED SOURCES OF SUPPLY AND SERVICES

[FAR Part 8](#) requires that the Government look first to acquiring its supplies and services from or through Government supply sources before acquiring them from the open market (independent contractors). The Contracting Officer must consider the following sources in descending order of priority:

For supplies:

- Agency inventories
- Excess from other agencies
- Federal Prison Industries, Inc.
- Products available from the Committee for Purchase from People Who Are Blind or Severely Disabled
- Wholesale supply sources, such as stock programs of the General Services Administration, the Defense Logistics Agency, the Department of Veterans Affairs, and military inventory control points
- Federal Supply Schedules

For services:

- Services available from the Committee for Purchase from People Who Are Blind or Severely Disabled
- Federal Supply Schedules
- Federal Prison Industries, Inc.

If these sources cannot meet the Government's need (e.g., they do not offer the product/service needed, they cannot deliver in time, etc.), then the Contracting Officer may consider open market sources.

OPEN MARKET ACQUISITIONS

SIMPLIFIED ACQUISITION

[FAR Part 13](#) describes simplified acquisition procedures. A simplified acquisition is an acquisition when the total amount involved does not exceed the simplified acquisition threshold (\$100,000; \$5 million for commercial items). There are four simplified acquisition procedures that are available to the Government:

- Imprest fund and third party drafts;
- Purchase card;
- Purchase orders; and
- Blanket purchase agreements.

Simplified acquisition allows the Government to accomplish acquisitions with a minimum of administrative costs and paperwork.

Domestic contracting offices must reserve all acquisition of supplies or services that exceed \$2,500 but do not exceed \$100,000 for U.S. small business concerns.

The solicitation document used in simplified acquisitions is called a Request for Quotations (RFQ).

FORMAL CONTRACTING

Once the anticipated amount of the acquisition exceeds \$100,000 (or \$5 million for commercial items), a formal contract must be issued. There are two methods used in formal contracting—**sealed bidding** and **negotiation**.

Sealed Bidding

Sealed bidding is described in [FAR Part 14](#). It is used when the Government can describe its requirements clearly and without ambiguity. Vendors submit competitive bids (offers), which are opened by the Government in a public ceremony. The Government awards a contract to the lowest-priced, responsive, responsible bidder. The Government cannot negotiate with the vendors regarding any aspect of their bid. This method is not used overseas because the concept is not familiar to foreign firms and does not allow the Government to conduct negotiations.

The solicitation document used in sealed bidding is called an Invitation for Bids (IFB).

Contracting By Negotiation

[FAR Part 15](#) pertains to contracting by negotiation. In a nutshell, negotiation is any acquisition method that is not sealed bidding. Vendors submit proposals (offers), but their proposals are generally separated into a technical proposal and a price proposal. The Government separately evaluates each vendor's technical and price proposals. There is no public opening of proposals. The Contracting Officer may conduct negotiations with those vendors that are still

considered competitive after the initial evaluation. These negotiations are for the purpose of discussing any and all aspects of the proposal, including any deficiencies. The Contracting Officer then provides the vendors the opportunity to revise their proposals (called a final proposal revision). The Government evaluates the final proposal revision and an award determination is made. An important difference between negotiation and sealed bidding is that the emphasis may be on the technical aspects of the proposals, in addition to the price, rather than on price alone.

The solicitation document used in contracting by negotiation is called a Request for Proposals (RFP). The RFQ (Request for Quotes) is also used.

Additional detail on acquisition methods is provided in the *COR Handbook*, [Section H-210](#).

MARKET RESEARCH

[FAR 2.101](#) defines market research as:

[T]he process used for collecting and analyzing information about capabilities within the market to satisfy agency needs.

Market research is required by law to—

- Promote full and open competition;
- Ensure that the Government satisfies its needs in a cost-effective manner; and
- Determine whether commercial items are available to meet the Government's needs. (Note: architect-engineering services and construction are not considered commercial items.)

[FAR 10.001](#) requires that market research be conducted in two separate stages when the requirement is expected to exceed \$100,000:

- By the requiring office (generally by the COR) before new requirements documents are developed.
- By the acquisition office before offers are solicited.

TYPE OF INFORMATION TO COLLECT

The extent of market research and analysis will vary depending on the urgency, value, and complexity of the proposed acquisition. The following are among the types of information to collect:

- Availability of supplies/services suitable as is, or with minor modifications, for meeting the need.
- Availability of companies to perform the work required.
- Terms and conditions and warranty practices under which commercial sales of the supplies/services are made.
- Requirements of controlling laws and regulations.
- Distribution and support capabilities of potential suppliers, including alternative arrangements and cost estimates.

POTENTIAL SOURCES OF MARKET INFORMATION

- Technical personnel, commodity specialists, price analysts, and other in-house experts on the supply or service and its market.
- The Internet.
- Catalogs and periodicals.
- Industry buyers of the same or similar supplies and services.
- [Federal Business Opportunities \(FedBizOpps\)](#) “sources sought” notices or local ads and surveys of potential suppliers.
- Trade and professional associations.

USES OF THE INFORMATION

Market information may be used in all pre-award duties, such as—

- Reviewing the proposed specification or Statement of Work to ensure that it encompasses all acceptable supplies or services, if any, in the market;
- Determining when to buy;
- Establishing delivery schedules that are realistic in terms of market conditions and practices;

- Suggesting sources for the solicitation mailing list (not an inclusive list to limit competition);
- Determining whether to purchase or lease;
- Identifying quantity breaks;
- Determining whether sources capable of satisfying the Government's requirements exist;
- Determining whether commercial items are available;
- Determining the extent to which commercial items could be incorporated at the component level; and
- Determining the practices of firms engaged in producing, distributing, and supporting commercial items, such as terms for warranties, buyer financing, maintenance and packaging, and marking.

LIMITATIONS AND PRECAUTIONS

Although a market survey is required before developing new requirements documents, the COR should be careful not to solicit (or be perceived as soliciting) a price quotation or proposal for the actual supplies or services to be acquired. Therefore, before conducting a market survey, the COR is highly encouraged to contact the Contracting Officer to coordinate the scope of his/her market survey. Not only is this involvement critical to the acquisition process, but also it could preclude the possibility of the COR taking an action that causes a vendor to incur costs, especially since the Government may be held liable for those costs.

The COR must inform vendors of the market research procedures. In addition, vendors should be advised that the Government requirements discussed as part of market research are subject to change and any technical exchange of information at this time cannot be considered in the subsequent Government's technical evaluation.

PROCUREMENT REQUEST PACKAGE (PRP)

The first step in the acquisition process is the preparation of the procurement request package (PRP). The requirements office (normally the COR) prepares the PRP when the estimated cost/price of the acquisition will exceed \$100,000.

CONTENTS OF THE PRP

The PRP contains, at a minimum, the following items:

- Project title or description.
- Whether the request is for a new requirement or a modification to an existing contract.
- Whether the request is competitive, noncompetitive, set-aside for an 8(a), or is a delivery or task order under an existing contract.
- Name, office, and telephone number of assigned COR.
- Whether the proposed action was included on the advance procurement plan.
- Proposed duration of contract or modification.
- Funds cite, if not provided separately.
- Statement of Work or specifications.
- Independent Government Cost Estimate.
- Necessary approvals.
- Suggested sources, if known.
- Special instructions, if any.

Technical evaluation factors and a technical evaluation plan might also be required, depending on the requirement.

Taken together, these items provide the basis for deciding how the acquisition will be conducted and how a contract will be awarded. The PRP gives the Contracting Officer information necessary to prepare and issue a solicitation document that tells prospective offerors what the Government needs, what terms will govern the anticipated contract, and how to submit offers.

Refer to the *COR Handbook*, Section [H-330](#), for complete information on PRP content and format.

STATEMENT OF WORK/SPECIFICATIONS

The Statement of Work or specifications is the most critical part of the request as it serves as the foundation for the solicitation. This document describes what supplies or services the Government is acquiring. It explains what is to be accomplished in terms of products or results so that the Government can effectively monitor and evaluate the contractor's progress and final result. To the maximum extent feasible, it is specific as to Government furnished materials, property, or information, reporting requirements, performance standards, and other appropriate factors.

The Statement of Work or specifications sets forth the requirements in such a manner that will encourage maximum competition and eliminate, insofar as possible, any restrictive features that might limit acceptable offers to one vendor's product.

Needless to say, its importance cannot be overstated. The failure to accurately describe what it is that the Government wishes to acquire can lead to countless problems, not the least of which could be the acquisition of something the Government does not want and cannot use. If the requirements are not clear and definitive, some vendors may elect not to submit offers either because of uncertainty about the risks involved or because they do not perceive a match between the requirements and their capabilities.

See Unit 4 of this text and the *COR Handbook*, Section [H-340](#), for detailed information on the preparation of the Statement of Work or specifications.

INDEPENDENT GOVERNMENT COST ESTIMATE

In order to reserve funds for any acquisition, the requirements office must estimate the cost of the acquisition. All costs associated with contracts fall into three major areas. They are—

1. Direct costs (personnel, equipment, supplies, travel, subcontractors or consultants, computer time, etc.);
2. Indirect costs (overhead, general and administrative expenses, fringe benefits); and,
3. Profit or fee.

While the job of estimating costs can appear difficult, it can be made less onerous by proceeding to estimate the costs for each task as described in the Statement of Work.

See the *COR Handbook*, Section [H-350](#), for complete information and formats for preparing the cost estimate.

TECHNICAL EVALUATION FACTORS

In a negotiated acquisition, the award decision may be based on factors other than lowest price. These factors must be conveyed in the solicitation document.

Technical evaluation factors form the basis on which the offers are evaluated and the selection made under negotiated acquisitions. As such, clearly written factors are crucial to the success of an acquisition. Clear factors benefit the Government in the following ways:

- By encouraging competition by indicating all factors that the Government considers important in fulfillment of the contract.
- By encouraging objective scoring of offers through the use of the factors in the evaluation process.
- By providing a public record so that all parties may be certain of the impartial criteria used as the basis for the contract award.

Clear factors also benefit the offerors by—

- Encouraging competition through the use of objective scoring of each offer; and,
- Explaining exactly what the Government expects in each offer.

For detailed information on developing technical evaluation criteria and a technical evaluation plan, see the *COR Handbook*, Section [H-360](#).

CONTRACT TYPE

Based on the Statement of Work or specifications, the Contracting Officer will determine the contract type best suited to the Government's interests. The term "contract type" refers to the arrangement that will govern the compensation for the work to be done.

See the *COR Handbook*, Section [H-230](#), for a discussion of contract types most frequently used at the Department of State.

APPROVALS

Where appropriate, offices within the Department are required to approve the acquisition of certain items or services. Please refer to the *COR Handbook*, [Exhibit H-332.1](#) for a listing of the approval requirements for supplies and services.

SOLICITATION DOCUMENT

FORMAT

After receiving the Procurement Request Package, the Contracting Officer will prepare the solicitation document (RFQ, IFB, or RFP). Typically, the solicitation document contains the following elements:

1. A solicitation/contract form that states when offers are due and who the contact person is. The contact person is always the Contracting Officer or a contract specialist or procurement agent on his/her staff.
2. Pricing information (the Government specifies the units; the offerors will fill in the amounts). However, the Independent Government Cost Estimate (I G C E) is *not* provided in the solicitation.
3. The Statement of Work or specifications.
4. Contract clauses.
5. Certifications and representations.
6. Instructions to offerors on how to submit their offers (e.g., how many copies, etc.), as well as conditions pertaining to the offers (e.g., late offers).
7. The basis for award (e.g., lowest price, technical evaluation criteria, etc.).

APPROVAL OF SOLICITATION DOCUMENT

All Government employees who will be involved in the evaluation of offers (called a Technical Evaluation Panel) must be familiar with and understand the solicitation prior to its release to the public. All evaluators must understand what the Statement of Work requires the contractor to do. This prevents misinterpretations later during the evaluation process. If technical evaluation factors are included, each evaluator must be in agreement on what specifically is meant by each factor. Agreeing on the meaning of each factor ensures that

offers are evaluated consistently and should prevent any significant variations in scores.

PRE-PROPOSAL CONFERENCES

As indicated before, the Statement of Work is the determining feature throughout the acquisition process. In those cases where the Statement of Work is complex, it may be necessary to supplement prospective offerors' understanding of the requirement through the use of a pre-proposal conference. A pre-proposal conference may be held to brief prospective offerors after the solicitation has been issued but before offers are submitted.

The Contracting Officer and the COR jointly decide whether to hold a pre-proposal conference. Such conferences should not be used indiscriminately because of the time and expense involved for both the Government and the prospective offerors. Whenever possible, the Government should make the decision to hold a pre-proposal conference before the solicitation is issued so that a notice to that effect may be included in the solicitation. Sometimes, however, the need for a conference may not become apparent until the questions received from prospective offerors reveal significant variations in interpretations.

A site visit is a pre-proposal conference that is held at a particular location when contract performance must take place at that specific location (such as the construction of a building), and it is necessary and desirable that prospective offerors see the site prior to preparing their offers.

The Contracting Officer or his/her designated representative conducts the conference, furnishes all prospective offerors identical information concerning the proposed acquisition, makes a complete record of the conference, and promptly furnishes a copy of that record to all prospective offerors. Any remarks and explanations at the conference do not qualify the terms of the solicitation; the terms of the solicitation do not change unless and until the Contracting Officer amends the solicitation in writing.

GUARDING INFORMATION DURING PRE-AWARD PERIOD

All Government personnel must guard against furnishing to an offeror or potential offeror any information that may afford a competitive advantage over other offerors. Between the time that a solicitation is issued and the time of award of a contract, the COR and the Contracting Officer must coordinate closely on any questions received from prospective offerors. The COR must refer, *without answering*, all questions received from prospective offerors to the

Contracting Officer. This procedure ensures that all offerors receive equal treatment.

SOLICITATION AMENDMENTS

A solicitation amendment is a change made to a solicitation after it has been issued. All changes to a solicitation must be done in writing in the form of an amendment.

Solicitation amendments almost always cause additional administrative effort and costs for both the Government and prospective offerors. An amendment that significantly alters the requirement usually requires an extension of the offer due date, resulting in a delay in contract award. Careful planning prior to issuance of the solicitation can minimize instances where amendments will be required. Writing specifications and Statements of Work that are clear, comprehensive, and accurate and procurement requests that are internally consistent will help reduce the likelihood of having to issue amendments.

Sound planning aside, however, there are occasions when a solicitation amendment is unavoidable or even desirable. If the Government's requirement changes in any way, it is under no obligation to proceed with the original solicitation and should amend the solicitation to agree with the revised requirement. If a prospective offeror requests additional information or clarification which, if provided, would give him or her a competitive advantage, the Government must make the information available to all firms by means of an amendment.

Before requesting that a solicitation be amended, the COR should consult with the Contracting Officer to determine the effects the proposed amendment may have on such things as the estimated cost, the due date for receipt of offers, the proposed delivery schedule, or the conduct of the solicitation itself. If an amendment is approved, the Contracting Officer (and only the Contracting Officer) will prepare the amendment and send it to the same firms that received the original solicitation.

In a sealed bid acquisition, the IFB may not be amended once the bids are opened. In a negotiated acquisition, an amendment may be issued before or after receipt of offers.

See [Section H-410](#) of the *COR Handbook* for more information on solicitations, publicizing requirements, solicitation mailing lists, pre-proposal conferences, communications with offerors, and solicitation amendments.

TECHNICAL PROPOSAL EVALUATION

During the technical evaluation process, the technical and cost proposals are evaluated separately by individuals working under the direction and supervision of the Contracting Officer. The COR is a member of the evaluation team and typically serves as the chairperson of that team (called a Technical Evaluation Panel).

Proposals submitted in response to an RFP are evaluated in accordance with the procedures set forth in the *COR Handbook*, [Section H-420](#), and need not be repeated here. It is important to note, however, that throughout the evaluation process, the Contracting Officer is responsible for all activity regarding proposal evaluation. The Contracting Officer is responsible for ensuring the propriety and regularity of the way in which the technical evaluation is conducted. The COR is generally responsible for the administrative details of assembling the Technical Evaluation Panel members and for providing technical support.

The COR, if serving as the panel chairperson, is also responsible for preparing the panel's report.

See [Section H-420](#) of the *COR Handbook* for detailed information on the technical evaluation process, including guidance on how to perform the technical evaluation.

NEGOTIATION

In Government contracting, the term “negotiation” refers to any and all oral or written discussions held with offerors who submit proposals. Negotiations are conducted with all offerors determined by the Contracting Officer to be in the “competitive range,” when factors other than lowest price are the basis for the award.

The Contracting Officer is the leader of the negotiating team and is supported by the COR, the GTM (if any), and other members of the negotiating team (e.g., legal counsel, cost/price analysts). As a member of the negotiating team, the COR is an active participant in the negotiation of the technical and programmatic aspects of the contract. The COR is responsible for developing a position with respect to the approximate level of effort (an analysis of the number and types of personnel proposed and the number of labor hours or person days proposed), the proposed use of consultants and subcontractors, travel plans, the proposed management and work plans, timetable and key personnel assignments.

The purpose of negotiations is to advise each offeror in the competitive range of the deficiencies in its proposal; attempt to resolve any uncertainties concerning a technical proposal and other terms and conditions of the proposal; resolve any suspected mistakes by calling them to the offeror's attention; and provide the offeror a reasonable opportunity to submit any cost or price, technical, or other revisions to its proposal that may result from the negotiations (called a "final proposal revision").

Prior to negotiations, the Contracting Officer normally meets with the COR and/or members of the Technical Evaluation Panel to review the panel's findings and determine what information will be provided each offeror and requested from each offeror concerning its proposal. This process is known as setting negotiation objectives. It is an important step because it provides a plan for the conduct of the negotiations.

During negotiations, the Government is prohibited from engaging in (1) technical leveling, which is helping an offeror to bring its proposal up to the level of other proposals through successive rounds of negotiations; (2) technical transfusion, which is disclosing technical information pertaining to a proposal that results in the improvement of a competing proposal; and (3) auctioning, which includes advising an offeror of a cost or price it must meet to be considered further, its cost or price standing relative to any other offeror, or any other information about other offerors' proposals.

FINAL PROPOSAL REVISIONS

Upon completion of negotiations with all offerors in the competitive range, the Contracting Officer issues a request for final proposal revisions. Each offeror then has the opportunity to either resubmit its proposal in its entirety or to modify its original proposal. An offeror may change any aspect of its proposal in its final proposal revision, including its price. An offeror may also choose to make no revisions at all. The Contracting Officer specifies a reasonable due date, and the same rules for late proposals apply to the final proposal revisions.

REEVALUATION

When the final proposal revisions are received, the same evaluation process that was used on the original proposals is repeated. The Technical Evaluation Panel reconvenes to evaluate the new proposals and to make recommendations to the Contracting Officer. The Contracting Officer conducts any necessary price or cost analysis, weighs the costs with the technical evaluation results, and determines whether an award can be made. The Contracting Officer has the authority to reopen negotiations and call for another round of final

proposal revisions, but this should be done only when it is clearly in the Government's best interest to do so, and when technical leveling or transfusion can be avoided.

See [Section H-430](#) of the *COR Handbook* for more information on the negotiation process.

AWARD

Following the receipt of final proposal revisions and a revised report from the Technical Evaluation Panel, the award decision is made. Generally, the Contracting Officer will make this decision; however, on exceptionally important acquisitions, the "source selection official" may be a person at a higher level than the Contracting Officer. Although the source selection official has broad discretion (for example, the authority to disagree with the technical and/or cost/price evaluations and recommendations), the source selection official must adhere to the evaluation criteria as stated in the RFP. Also, the source selection official must document the reasons for the decision.

Before making the award, the Contracting Officer must make one very important determination: that the selected offeror is responsible. To be considered responsible, an offeror must—

- Be technically competent to perform the work at a fair and reasonable price;
- Possess adequate financial resources or the ability to obtain them;
- Be able to comply with the delivery or performance schedule;
- Have a satisfactory history of past performance, integrity, and business ethics; and
- Be otherwise qualified and eligible to receive the award.

See [Section H-443](#) of the *COR Handbook* for more information on responsibility determinations.

NOTIFICATIONS AND DEBRIEFINGS

After award, the Contracting Officer must notify all unsuccessful offerors in writing of the name and address of the awardee, the total price of the award, the reasons, in general terms, why the offeror was unsuccessful, and the fact that additional information may be obtained from the Contracting Officer.

Any unsuccessful offeror must be debriefed, upon written request, when the award decision is based on factors other than cost/price. The Contracting Officer must conduct the debriefing, although the COR is often present and may be called upon by the Contracting Officer. Debriefing information will include the Government's evaluation of the significant weak or deficient factors in the offeror's proposal, but no comparisons with other offerors' proposals may be made. The Contracting Officer may not disclose the relative technical or cost standing of the offeror and other competitors, nor may he/she reveal proprietary information such as manufacturing processes or techniques, trade secrets, or financial data belonging to competitors. The purpose of a debriefing is to point out areas where the offeror can improve its chances of success in future acquisitions. It is not designed to be an opportunity for technical transfusion to the unsuccessful offeror.

CORs should be sensitive to the fact that most unsuccessful offerors have a real desire to know why they lost the acquisition and may possibly approach someone who was involved in the acquisition and try to find out why. The COR must reject such contacts and refer the offerors to the Contracting Officer in order to maintain the integrity of the acquisition process.

See [Section H-450](#) of the *COR Handbook* for more information on debriefings.

PROTESTS

DEFINITION OF "PROTEST"

A protest is a formal, written complaint by an interested party—usually an offeror or potential offeror—based on a perceived defect in the solicitation or a deficiency in the source selection process. A protest may be filed directly with the Contracting Officer or the General Accounting Office.

PROTEST REQUIREMENTS

To be considered, a protest against a solicitation or contract award must meet all of the following requirements:

- It must be submitted in writing to the Contracting Officer or General Accounting Office.
- It must specify factual, legal, or other defects in the solicitation, the award, or both.
- It must be filed in a timely manner.

EFFECTS OF A PROTEST

When a protest is filed before contract award, the contract may not be awarded until the protest is decided, unless the agency decides that not awarding the contract would injure the Government. If a protest is filed after award, the Contracting Officer, with advice from the legal adviser, must determine whether or not to allow the contractor to proceed.

COR's ROLE

While CORs are not directly involved with the protest procedures, the Contracting Officer and the legal adviser often call upon the COR to provide information in defense of the agency's position. CORs should also understand that no information concerning a protested acquisition should be provided to anyone other than the Contracting Officer without the Contracting Officer's knowledge and authorization.

UNIT 3 REVIEW EXERCISES

Answer the following questions. Then, check your answers against the ones in the [Answers](#) section.

1. The Request for Proposal is the solicitation document used for sealed bidding.
True False
2. Market research is the process used for collecting and analyzing information about consumer demand for different products on the market.
True False
3. Normally, the COR prepares a Procurement Request Package when the estimated cost/price of the acquisition will exceed \$100,000.
True False
4. Offers received in response to an RFP are opened in public.
True False
5. The Statement of Work describes the source from which supplies or services must be acquired.
True False
6. When preparing the Independent Government Cost Estimate, the COR includes direct costs, indirect costs, and profit or fee.
True False
7. When necessary, the COR may amend the RFP or IFB at any time before award.
True False
8. Typically, the COR is the leader of the negotiating team.
True False

UNIT 3 EXERCISE ANSWERS

1. **FALSE.** Explanation: The Request for Proposal (RFP) is the solicitation document used for negotiated acquisitions. The solicitation document used for sealed bid acquisitions is an Invitation for Bid (IFB). (See Page 3-3.)
2. **FALSE.** Explanation: For the purposes of the Government, market research is the process used for collecting and analyzing information about the market's capability to satisfy agency needs. (See Page 3-4.)
3. **TRUE.** Explanation: Normally, the COR prepares a Procurement Request Package when the estimated cost/price of the acquisition will exceed \$100,000. (See Page 3-6.)
4. **FALSE.** Explanation: Offers received in response to an RFP are proposals. Information contained in proposals must always be protected (See Page 3-11). Therefore, they are never opened in public. Offers received in response to an IFB (bids) are opened in public. (See Page 3-3.)
5. **FALSE.** Explanation: The Statement of Work describes the supplies or services that are to be acquired. (See Page 3-8.)
6. **TRUE.** Explanation: When preparing the Independent Government Cost Estimate, the COR includes direct costs, indirect costs, and profit or fee. (See Page 3-8.)
7. **FALSE.** Explanation: When necessary, the Contracting Officer (*not* the COR) may amend the solicitation used in negotiated acquisitions (an RFP), but the solicitation used for sealed bid acquisitions (an IFB) may *not* be amended once bids have been received. (See Page 3-12.)
8. **FALSE.** Explanation: The Contracting Officer is the leader of the negotiating team. (See Page 3-13.)

UNIT 3 SUMMARY

The Government may acquire goods and services through—

- Existing and required sources; or
- Through an open market acquisition. Open market acquisitions may be made by—
 - Simplified acquisition procedures, or
 - Formal contracting. There are two methods used in formal contracting—
 - Sealed bidding; and
 - Negotiation.

Market research is the collection and analysis of information about the market's capability to satisfy agency needs. The extent of market research and analysis will vary depending on the urgency, value, and complexity of the proposed acquisition. Information that might be collected includes availability of supplies/services suitable for meeting the need or availability of companies to perform the work required.

The first step in a specific acquisition is the preparation of the procurement request package (PRP). The contents of the PRP are listed on page 3-7. Included in the PRP are the SOW or Specifications; the I G C E; technical evaluation factors; information about the contract type; and approvals.

The PRP gives the Contracting Officer information necessary to prepare and issue a solicitation document that tells prospective offerors what the Government needs, what terms will govern the anticipated contract, and how to submit offers. The Contracting Officer might hold a pre-proposal conference. If necessary, the Contracting Officer may amend a solicitation for a negotiated acquisition.

Proposals submitted in response to an RFP are evaluated under the direction and supervision of the Contracting Officer. The COR is a member of the evaluation team (called a Technical Evaluation Panel) and typically serves as the chairperson.

After proposals are received, the Contracting Officer determines which offers are within the competitive range. Negotiations are conducted with all these offerors. Offerors are given an opportunity to make final proposal revisions; the proposals are reevaluated; and an award is made. Winners are notified. Losers are debriefed. Hopefully, there are no protests.

REMINDERS TO CORs

As a COR, you should remember the following points:

- **DO** be careful, when conducting market research, not to solicit (or appear to be soliciting) a price quotation or proposal for an actual acquisition.
- **DO** refer to the Contracting Officer all questions received from offerors or prospective offerors during the preaward phase of an acquisition.
- **DO NOT** furnish any information to an offeror or prospective offeror that may afford a competitive advantage over other offerors.
- **DO** remember that no information concerning a protested acquisition should be provided to anyone other than the Contracting Officer.

UNIT 4 — THE STATEMENT OF WORK (SOW)

IMPORTANCE OF UNIT TO COR

Although the primary responsibility for writing the SOW rests with the COR, the SOW should be the result of a team effort. The team should include functional area specialists, experts from the sponsoring bureau or office, and the Contracting Officer.

UNIT OVERVIEW

A contract must contain some sort of requirements description. The SOW is the heart of the contract. It is our way of communicating to the contractor what we want the contractor to do.

In this unit, we will discuss—

- The importance of a well-written SOW;
- Types of SOWs (design-oriented SOW vs. Performance Work Statement (PWS));
- The process of writing the SOW;
- The characteristics of a well-written SOW.

THE IMPORTANCE OF A WELL-WRITTEN SOW

AFTER READING THE MATERIAL IN THIS SECTION AND COMPLETING THE REVIEW EXERCISES, YOU WILL BE ABLE TO—

- Identify essential qualities of requirements documents as stipulated by Government policy;
- Identify ways in which the quality of the SOW affects responses;
- Identify ways the quality of the SOW affects contract administration; and
- Identify the Rule of Ambiguity.

GENERAL POLICY

Government policy requires that plans, drawings, specifications, and purchase descriptions must—

- State only the “functional needs” of the Government;
- State functional needs in a form that permits maximum competition and innovation; and
- Avoid restrictive features that limit acceptable offers to one or a few products, unless the restrictions are essential to meeting the Government’s functional needs.

IMPORTANCE OF A WELL-WRITTEN SOW BEFORE CONTRACT AWARD

EFFECT ON RESPONSE TO THE SOLICITATION

When released in a solicitation document, the SOW may affect the number of vendors who respond, as well as the quality of the proposals received. If it is not definitive, some vendors may not respond because of uncertainty about the risks involved or the work to be performed.

A well-written SOW facilitates competition because it clearly communicates the Government’s requirements to each prospective contractor.

A well-written SOW tends to elicit well-written proposals. A poor quality SOW will make it difficult for vendors to adequately estimate costs to perform the contract work. Unclear and unworkable SOWs will cause problems to all parties involved.

PROPOSAL EVALUATION

The clarity and explicitness of the requirements presented in the SOW typically enhance the quality of the proposals submitted and may reduce the time needed for proposal evaluation.

IMPORTANCE OF A WELL-WRITTEN SOW AFTER CONTRACT AWARD

The SOW is the foundation for contracting. It contains the specific tasks that the contractor must perform. As the technical portion of the contract, it typically includes the necessary requirements, quality assurance provisions, and delivery requirements, which must be defined before entering into a contract.

LEGAL IMPLICATIONS

Once the contract is awarded, both contractor and Government personnel are required to follow the SOW.

Lawsuits have resulted from different interpretations of the SOW by contractor and Government personnel. Many different people—such as the contractor, the Contracting Officer, quality assurance evaluators, inspectors, and engineers—have an interest in the SOW. Sometimes these people may misinterpret the SOW because they read it with different frames of reference. A well-written SOW prevents such misinterpretations and can be interpreted uniformly by all concerned parties.

CONTRACT INTERPRETATION

Many problems in contracting performance stem from disagreements about the precise scope of the Government-contractor agreement. In their book on contract administration, Professors Ralph Nash and John Cibinic noted that

[T]he complexity of Government projects, the formality of procedures used in contract formation and the lengthy contract documents and specifications that are so often in federal procurement provide fertile ground for contract interpretation controversies. ... Thus an understanding of the rules and procedures used in the interpretation process is essential not only

for resolving controversies and disagreements but also for parties to appreciate the significance of words and acts transpiring during contract formation and performance and their relationship of such to words in the contract documents.”²

The basic role of the contract document is to express the intent of the parties. If contract requirements are poorly or inadequately written, it fails to express the intent of the parties. This failure frequently leads to claims or disputes concerning the meaning of the contractual language.

Claims and or disputes due to poor wording in the contract might be resolved against the Government and result in additional payment to the contractor. Therefore, it is important that those who write the SOW ensure that the SOW is clear, complete, concise, specific, and expresses the Government’s functional needs.

Well-written SOWs enable the Government to satisfy the requirements with enforceable contracts, and with less administrative cost and effort.

CONTRACT ADMINISTRATION

A well-written SOW facilitates contract administration. It will allow consistent interpretation, alleviating the need for frequent direction from the requirements office. In addition, a clear definition of what is and is not “within the scope” of the contract will prevent the need for repeated changes and contract modifications, resulting in savings of time and money to both the contractor and the Government.

In fact, it may be said that the level of clarity, completeness, and precision in the SOW is a good predictor of the success of the whole effort.

RULE OF AMBIGUITY

Remember the “Rule of Ambiguity.” If more than one meaning can be reasonably inferred by a phrase or provision, courts or boards of contract appeal will rule *against the drafter* of the phrase or provision. This means that most rulings will go against the Government, and that the contractor will be able to use the interpretation that is most favorable to him or her. This can be very costly for the Government.

² *Administration of Government Contracts*, p. 102, 2nd ed

Example: An agency custodial services contract had a task phrase that read: “Clean/Service restrooms.” The agency’s intention was for the contractor to clean *and* service restrooms, but the contractor interpreted the phrase as clean *or* service. The contract modification to have the contractor both clean and service restrooms as the agency intended cost the agency an additional \$86,000.

UNIT 4 REVIEW EXERCISE #1

Answer the following questions. Then, check your answers against the ones in the [Answers](#) section.

1. Choose the correct alternative words:

Government policy requires that plans, drawings, specifications, and purchase descriptions must—

- State only the [**functional needs**] [**optimal needs**] of the Government;
- State [**functional**] [**optional**] needs in a form that [**permits maximum**] [**minimizes**] competition and innovation; and
- Avoid restrictive features that limit acceptable offers to one or a few products, unless the restrictions are [**essential**] [**helpful**] to meeting the Government's functional needs.

2. Once the contract is awarded, the SOW serves no further purpose.

True

False

3. The Rule of Ambiguity states that, if more than one meaning can be reasonably inferred from a phrase or provision in a contract, then the court will rule against the party who drafted the phrase or provision.

True

False

UNIT 4 EXERCISE #1 ANSWERS

1. Choose the correct alternative words:

Government policy requires that plans, drawings, specifications, and purchase descriptions must—

- State only the “**FUNCTIONAL NEEDS**” of the Government;
- State **FUNCTIONAL** needs in a form that **PERMITS MAXIMUM** competition and innovation; and
- Avoid restrictive features that limit acceptable offers to one or a few products, unless the restrictions are **ESSENTIAL** to meeting the Government’s functional needs.

(See Page **4-2**)

2. **FALSE.** Explanation: Once the contract is in effect, the SOW becomes a legal and binding element of that contract. (See Page **4-3**.)
3. **TRUE.** The Rule of Ambiguity states that, if more than one meaning can be reasonably inferred from a phrase or provision in a contract, then the court will rule against the party who drafted the phrase or provision. (See Page **4-4**.)

TYPES OF WORK STATEMENTS

AFTER READING THE MATERIAL IN THIS SECTION AND COMPLETING THE REVIEW EXERCISES, YOU WILL BE ABLE TO—

- Distinguish between a design SOW and a Performance Work Statement (PWS);
- Identify examples of performance measures;
- Identify the three main elements of a performance measure;
- Identify the purpose of a Quality Assurance Plan (QAP), also referred to as Quality Assurance and Surveillance Plan (QASP); and
- Identify the purpose of the deductions in a QAP/QASP.

TYPES OF REQUIREMENTS DOCUMENTS

Requirements documents describe what is to be provided to the Government. Two types of requirements documents are Statements of Work (SOWs) and specifications. Specifications ordinarily describe goods—that is, supplies, or tangible products. The SOW ordinarily describes services. The SOW may contain specifications (but specifications don't contain SOWs).

The description of work required of a contractor in Government service contracts goes by a variety of names, including—

- Statement of Work (SOW);
- Work Statement;
- Technical requirements;
- Scope of work.

While very little regulatory and guidance material has been written on how to prepare and organize the SOW, there is information on developing specifications for material, supplies, and equipment. Much of this guidance can be adapted to preparing the SOW for a service contract.

Unlike specifications, most SOWs cover unique requirements that apply to the particular service to be performed and cannot be “prepackaged.” But, there are some situations where the basic SOW can be tailored for similar, subsequent contracts.

In any case, the general policy above should be followed, and the SOW should be **clear, complete, concise, and specific**, and it should **express the functional needs** of the Government.

DESIGN AND PERFORMANCE

The terms “design” and “performance” are used to distinguish between the two main types of SOWs. SOWs are rarely all performance or all design. Usually, they are a mixture of both. The preferred type of SOW for services is the “performance based” type, and it should be referred to as a “Performance Work Statement (PWS).”

A. DESIGN SOW

Design-oriented SOWs provide a precise statement of the work to be performed, including such particulars as material to be used, work methods, and work environment. There are many types of design SOWs. For example, the Government may require or advise that a contractor follow a given design or blueprint during production, use specific materials or incorporate specific processes into its performance. The Government states the details on how the contractor will accomplish the work to be done.

When writing a design SOW, the Government’s directions to the contractor must be accurate and complete. All terms and symbols must be given the “meaning which a reasonably intelligent contractor acquainted with the circumstances surrounding the contract would derive.” *Salem Engineering & Construction Corp. v. United States*, 2 Cl. Ct. 803 (1983).

Implied Warranty

The Government may be liable if the details that it specifies create problems that the contractor could not reasonably foresee. Or stated in another way, risks are allocated to the Government if its specifications, or other requirements documents, result in inefficiencies and decreased productivity. The legal principle applicable in such a case is called Doctrine of Implied Warranty, which allocates the risk to the Government when the specifications (or other requirements document) that it furnishes to the contractor are not suitable for their intended purpose. *United States v. Spearin*, 248 U.S. 132 (1918).

In a design SOW, the contractor's responsibility is to follow the steps outlined by the Government. The Government's responsibility is to ensure that the design SOW will produce the intended results.

Example: The Government wrote a very detailed design SOW describing the materials and methods of installation for a lighthouse foundation. When the contractor began performing according to the requirements documents, the piles sunk in quicksand below the surface. The Government was liable for the extra cost.

Inspection of Contractor Performance

As you can see, quality assurance³ is simplified when a design SOW is involved. It's easier for Government inspectors to check on the contractor. They inspect the contractor's performance at any time to see whether the Government's directions have been followed and the work is on schedule. If the contractor has not followed the design SOW, the deviations can be corrected during the period of performance and not after the work has been completed.

Less Risk to Contractor

The contractor's quality control is also simplified. Because the Government warrants that the desired results will be achieved if the contractor follows directions, there is less risk to the contractor. The contractor must only ensure that the directions are followed exactly.

B. PERFORMANCE WORK STATEMENT (PWS)

The PWS describes to prospective contractors what is to be accomplished and what constraints are placed on the effort. It tells the contractor the objectives to be accomplished, the goal or the desired achievement. It may also include incentives. It does not tell the contractor *how* to accomplish the requirement. The PWS is the preferred type of work statement for most services. The service exceptions are construction, architect-engineering, and utility services.

Contractor Responsibility

The Government places most of the responsibility for performance on the contractor because that particular contractor was selected on the basis of its expertise and ability to perform.

³ Quality *assurance* is what the Government does to ensure satisfactory performance by the contractor. Quality *control* is what the contractor does to ensure its performance satisfies the contract requirements.

Note: However, the PWS *may require testing* to ensure contract requirements have been met.

The Government is not liable for a contractor's increased costs in achieving performance.

Example: The Government specification required a minimum of 4 1/2 sacks of cement be used per cubic yard. In order to pass the performance tests, the contractor used five sacks. The contractor would not be entitled to an increase in payment, presuming the contract type used was a firm-fixed-price (FFP).

Results vs. Method

The PWS should state requirements in general terms of *what* (results) is to be done—output, function, or result—rather than *how* (methods) it is to be done. Essentially, it provides the answer to the question, “What do we want to accomplish as the result of the contract?”

Example: A services contract for a training course might require trainees who complete the course be able to demonstrate certain skills, without giving any details on how the contractor is to conduct the training. The performance details are left up to the contractor. Again, the PWS might require testing to ensure that the contract requirements have been met.

You may elect not to address the required tasks and merely provide outcomes/results in a Statement of Objectives (S O O). With the S O O approach, the contractor must list in its proposal the necessary tasks to be performed for each outcome. These tasks will then be formally incorporated into the contract. The S O O approach offers the contractor maximum flexibility in proposing. It also places back on the contractor the burden of making sure it really understands the Government's objectives.

Encouraging Competition

The PWS gives the contractor maximum flexibility to devise the best method to accomplish the required result. The PWS must be written so as to ensure all bidders compete equally. Any features that could restrict a potential contractor must be removed. However, the PWS must also be descriptive and specific enough to protect the interests of the Government and to promote competition.

Performance Measures

Performance measures are used to evaluate contractor performance and compliance with the terms and conditions of the contract. The Government looks at contractor performance under the contract. Then the performance is compared with a standard to determine if the desired quality has been achieved. If there is any variation from the standard, the relative amount (the rate of error) is calculated to determine whether the contractor's performance is acceptable.

Sometimes it is hard to write a PWS because the service to be performed is difficult to quantify or measure. For example, housekeeping services deal with cleanliness and neatness. These characteristics are usually associated with the subjective senses of sight and feel and are difficult to describe objectively. What is meant by the phrases: "clean" window, a "waxed" floor, or a "polished" desk? These terms are not useful unless they can be measured and compared to an objective standard.

Exhibit 4-1: Examples of Performance Measures

Indicator	Standard	Acceptable Quality Level (AQL)
Speed	20 miles per hour	99% / 1% (99 out of every 100 units inspected can move at 20 mph)
Timeliness	Calls resolved within 1 business day	96% / 4% (96 out of every 100 calls monitored were resolved within 1 business day)
Accuracy	No more than 1 error per record	97% / 3% (No more than 3 out of every 100 records inspected have more than 1 errors)

Note that the AQL is expressed as a percentage that can define either the minimum portion of units that meet the standard *or* the maximum portion of substandard units the Government is willing to accept. Be sure your solicitation makes the meaning clear—it should not say only "The AQL is 10%" without an explanation.

Definition of Performance Measure

The process of establishing quality measures for a PWS is called "performance analysis." The specific measures of performance established in a PWS are called "performance measures." Sometimes performance can be made

measurable by incorporating a reference to a Government or industry standard.

There are typically three components to a performance measure:

- An Indicator (the quality that is to be measured).
- The Performance Standard (the definition of good performance, the goal).
- The Acceptable Quality Level (AQL) (How much error we can accept?).

[Exhibit 4-1](#) shows some examples.

When developing performance measures, keep the following in mind:

- Ensure you're measuring the important things.
- Keep the measure simple but not too simple.
- Ensure the measure can be audited and validated (quantifiable measures preferred, since they are less subjective).
- Ensure the measure is attainable and worth the cost.
- Ensure the level of detail corresponds to the intent of the stated measure and outcome expected.

Example: The grams of dust per square centimeter on a vehicle may be a measurable performance standard for vehicle condition, but it's not a realistic indicator for general use. We may have to use a less satisfactory indicator—such as the number of times per month that a vehicle is washed.

Indicator

A performance indicator is a characteristic of work output that can be measured or counted. It may be quantitative or qualitative.

Best practice favors quantitative indicators because they are more objective and less likely to be challenged in application. They are also easier to develop in many cases.

Using qualitative indicators is less desirable, but is sometimes necessary. Especially in professional services, counting something may not provide a meaningful valuation of the services received. For example, if the contract were for legal services, a quantitative indicator of “number of legal opinions” would not be very useful in revealing the value of the services delivered.

The relevant question is, “What is the best measure of performance?” Sources of performance indicators include measures that are customarily associated with a job or task. In some cases, agency directives specify the performance indicators to be used.

Standard

A standard is a mark, a measure, or a yardstick by which something can be compared and judged. A standard may originate in a directive that regulates a service, in agency standards, in work location standards, or in industry standards.

A standard should reflect how well a service is performed in-house. We must not demand more of a contractor than the Government itself could provide if it were performing the same service in-house.

Acceptable Quality Level (AQL)

The AQL of a standard is the amount of variation from the standard that is permitted. It is the rate of error that is allowed. An AQL conventionally refers to objects that are produced on a production line, for example, automotive parts. As the individual parts come off the production line, they are evaluated to determine whether they are up to a certain quality. The number of acceptable units (units of the desired quality) is compared to the number of defective units. The portion of units that are acceptable is the quality level; the portion of defective units is the rate of error. It’s unrealistic not to expect at least a few errors, so the managers of the production line must decide what rate of error can be tolerated before the production process must be re-designed—they must decide what is an *acceptable* quality level.

Services can also be measured against an AQL. In a service contract, an AQL is expressed as the percentage of error that is allowed in providing that service over a period of time.

Example: In a custodial service contract, the AQL might be expressed as 90%. This means that, 90% of the time, the contractor must perform the custodial service according to the standards stated in the contract.

Of course, some quality levels—such as appearance and taste—are difficult to express and are a matter of judgment. But an AQL should rarely be one hundred percent (100%) because this means perfect performance, which is rarely necessary and is difficult and expensive to achieve.

Sometimes, a second AQL is provided for use during the “phase in” period of a service. This merely recognizes that it may take a little time for a new service to begin running efficiently.

Quality Assurance Plan (QAP) or Quality Assurance and Surveillance Plan (QASP)

After performance measures are established, they become part of a Quality Assurance Plan (QAP) or Quality Assurance and Surveillance Plan (QASP).

The Federal Acquisition Regulation ([FAR 37.602-2](#)) requires that agencies develop QASPs when acquiring services. These plans must recognize the responsibility of the contractor to carry out its quality control obligations and contain measurable inspection and acceptance criteria corresponding to the performance standards contained in the PWS. The QASP must focus on the level of performance required by the PWS, rather than the methodology used by the contractor to achieve that level of performance.

The QASP is prepared in conjunction with the preparation of the PWS. The QASP will specify what work requires surveillance (inspection) and the method of surveillance.

Think of the QASP as a management plan. It is a scheme to make sure that the government gets what it bargains for. Technical and contract personnel share responsibility for QASP development. Typically both the program/project director and the Contracting Officer sign the plan. In large or mission sensitive acquisitions, the agency may require upper level management approval.

A QAP/QASP may be summarized in a table called a Performance Requirements Summary (PRS). The PRS is a useful tool, but it is not required.

Contents of QAP/QASP

The QAP/QASP should include—

- The outcomes and related tasks that the contractor must perform;
- The performance standards and AQL for each outcome, which may include multiple tasks;
- The surveillance method to be used by the Government; and
- Incentives:
 - Negative incentives are the amount to be deducted from the contractor’s payment for either lack of performance or sub-

standard performance. (Note, however, that rework is always preferable to taking a deduction).

- Positive incentives, if appropriate, for contractor performance that exceeds satisfactory performance.

The QAP/QASP may also contain cross-references to the paragraphs in the PWS that require the work to be performed. Ideally, the QAP/QASP should include measures of every outcome and associated tasks that the contractor is to perform.

The QAP/QASP is referenced in the PWS or in Section E of the solicitation. However in most instances, due to its size, it is a separate contract exhibit. In addition there may be instances when the Government, as a part of its acquisition strategy, allows contractors to propose their own QAP/QASP or specific elements of the QAP/QASP to be incorporated into the contract.

Surveillance

Surveillance methods are the ways in which Government inspectors—including CORs—check contractor performance. The level of surveillance should be commensurate with the complexity of the contract.

Methods of surveillance include—

- (1) 100% inspection (this is recommended only where health and safety are at issue; otherwise it is not cost-effective and is too stringent);
- (2) Random sampling (good for recurring tasks/requirements);
- (3) Periodic inspection (use a predetermined plan based on analyses of agency resources and requirements);
- (4) Customer input (good service-oriented tasks; use a standard form);
and
- (5) Contractor self-reporting.

Remember don't inspect the process—just the outputs!

Deductions

Standard inspection clauses in Government contracts give the Government the right to deduct from the contractor's payment an amount equal to "the reduced value of the services performed."

Amount of Deduction

The most difficult aspect of using deductions is determining how much to deduct from the contractor's payment. The Federal Acquisition Regulation (FAR) states that the Government can only make deductions if the contractor cannot re-perform the services.

Example: A guard fails to report for his shift.

Office of Federal Procurement Pamphlet (OFPP)

In its Pamphlet No. 4, "A [Guide for Writing and Administering Performance Statements of Work for Service Contracts](#)," the OFPP has attempted to make the process easier. It requires a deduct analysis and, included in the PWS, the amount to be deducted and a formula showing how the deductions are to be calculated. (OFPP Pamphlet No. 4 bases its calculations on labor costs alone rather than value, because it would be difficult to "value" something before it happens.)

Substantial Performance

The contractor must be paid for "substantial performance." This means the contractor must be paid if—for the most part—he/she performs the work contracted for. With few exceptions, courts and boards of contract appeal frown on penalizing the contractor. Therefore, you must avoid the appearance of imposing penalties upon the contractors for partial or minimally substandard performance.

Example: Under the contract, the contractor is required to clean a room. The contractor cleans the room, but forgets to empty a wastebasket. While the room might not pass inspection in a strict sense, the Government can only deduct for the contractor's failure to empty the wastebasket because the contractor has substantially performed under the contract.

Deduct analysis is of little value in a contract that contains performance incentives. This is because poor performance will reduce the amount of incentive money the contractor earns. However, if you made a deduction and reduced the contractor's incentive payment, this could be interpreted as a "penalty".

As you can see, deduct analysis can get very complicated. The calculations made to determine the amount to be deducted must be very accurate. They should be kept in the COR files in case those deduct figures are challenged later.

UNIT 4 REVIEW EXERCISE #2

Answer the following questions. Then, check your answers against the ones in the [Answers](#) section.

1. In a design SOW, the Government tells the contractor what the contract objectives are, and the contractor determines how those objectives will be achieved.
True False
2. The purpose for including “performance measures” in the PWS is to evaluate the quality of the contractor’s internal management.
True False
3. The purpose of an AQL is to establish the amount of variation from contract performance standards that is permitted.
True False
4. The purpose of the QAP/QASP is to state the contract outcomes and associated tasks, performance measures, surveillance method(s), and the amount to be deducted from the contractor’s payment if those tasks are not performed or are performed below the AQLs.
True False
5. One hundred percent inspection is the recommended method of surveillance for all performance based service contracts.
True False

UNIT 4 EXERCISE #2 ANSWERS

1. **FALSE.** Explanation: In a design-type SOW, the design requirements provide a precise statement of the work to be performed, such as material to be used, work methods, and work environment. The Government states the details on how the contractor will accomplish the work to be done. (See Page **4-9**).
2. **FALSE.** Explanation: Performance measures do not need to be assigned for outputs related to the contractor's internal management. (See Page **4-12**.)
3. **TRUE.** (See Page **4-14**.)
4. **TRUE.** (See Page **4-15**.)
5. **FALSE.** Explanation: One hundred percent inspection is recommended only where health and safety are at issue; otherwise it is not cost-effective and is too stringent. (See Page **4-16**.)

PREPARING THE SOW

AFTER READING THE MATERIAL IN THIS SECTION AND COMPLETING THE REVIEW EXERCISES, YOU WILL BE ABLE TO—

- Identify the purpose of the SOW;
- Distinguish between level-of-effort and completion requirements;
- List the basic elements of the SOW; and
- List in order the procedural steps in preparing the SOW.

SOW WRITING TEAM

The SOW should be the result of a team effort. The team should consist of one or more functional area specialists, management analysts and/or subject matter experts from the sponsoring bureau or office, the Contracting Officer, and any other personnel that the proposed SOW requires, such as safety or security personnel.

The primary responsibility for writing the SOW rests with the COR. The personnel who best know the job should be used in writing the SOW and all areas that will be affected by the contractor's performance have input to the SOW writing process.

The team should review all contract requirements and regulations. It should prepare details of the work analysis, specific tasks, and cost estimates for each proposed contract task. The team approach requires coordination and cooperation, but it can deal effectively with a trade-off between essential and non-essential contract tasks. Ultimately, this process results in a more cost-effective contract for the Government.

FUNCTIONS OF THE SOW

The particular content of a SOW will vary with the nature, purpose, size, and complexity of the work to be performed. At a minimum, however, every SOW should—

- State the objectives of the acquisition;

- Identify the work to be performed and set parameters for the scope; and
- Define the way progress is to be measured and results are to be evaluated.

LEVEL-OF-EFFORT VS. COMPLETION REQUIREMENTS

When preparing the SOW, first identify whether the requirement is a—

- Level-of-Effort requirement (requires technical effort and a report of the effort); or
- Job/Task Completion requirement (requires that tangible results be attained along with the services performed).

A Level-of-Effort SOW should specify the kind of personnel required to perform the work, the nature of work, and required deliverables.

ELEMENTS OF THE SOW

The *COR Handbook* ([6 FAH-2 H-341.2-1](#) through [341.2-7](#)) describes seven basic elements of the SOW. The process of preparing the SOW must include consideration of these elements:

- **General description** of the objectives and desired results. Includes the scope; background information to help give a clear understanding of the requirements and how they evolved.
- A description of the **technical requirements**, tasks, subordinate tasks and phases.
- **Period of performance and deliverables/end results:** A description of reporting requirements and any other deliverable items, such as data. Also, period of performance.
- **Progress and compliance:** Describes how progress and compliance will be assessed. Reports, procedures for inspection and acceptance. Quality assurance provisions to determine the contractor's degree of compliance with SOW requirements.
- **Government furnished equipment**, data, or services.
- **Special considerations**, such as any known phenomena or techniques; any special requirements, such as safety or security. Travel requirements.

- **List of References and Attachments.** State whether the materials are included merely as background information or whether they set forth contractual obligations.

ORGANIZATION OF THE SOW

Well-written SOWs enable the Government to satisfy the requirements with better contracts, and with less administrative cost and effort. The goal is to arrange and present the elements of the SOW in a manner that—

- Is logical and easily understood; and
- Conveys exactly what is required of the contractor.

PROCEDURAL STEPS

The SOW Writing Team should follow these nine procedural steps in preparing the SOW:

1. Determine requirement objectives and sub-objectives.
2. Research and gather data.
3. Write the requirement outline.
4. Write the initial draft.
5. Edit the initial draft.
6. Critique the initial draft.
7. Review and modify the initial SOW draft.
8. Write the final version.
9. Incorporate the SOW into a solicitation package.

DETERMINE REQUIREMENT OBJECTIVES AND SUB-OBJECTIVES

The SOW Writing Team must first determine the objectives and sub-objectives of the requirement.

The objective is what the Government expects to pay for and receive when the contract is complete.

The objective should be a short, complete statement describing the entire requirement. The sub-objectives are the means to determine the objective.

Determining contract objectives and sub-objectives is only a drafting tool for the SOW writers. This provides a preliminary outline to an accurate and concise product. All these objectives need not become a part of the SOW, but they give the SOW writers a firm base from which to proceed.

RESEARCH AND GATHER DATA

The SOW writers research and gather pertinent data to ensure a complete, well-researched SOW.

Part of the data gathering process is job analysis. This is a critical step for the SOW writers because this is where all of the details of the requirement are considered.

WRITE THE REQUIREMENT OUTLINE

Once the data has been gathered, it must be organized into the format that the SOW will follow. This is done by preparing a detailed outline. This may be the most important step in preparing the SOW.

An outline uses key words and phrases to organize the data. The outline must be detailed, all-inclusive, and properly organized to be effective. When completed, the outline serves as a road map for the SOW writer.

The importance of a good outline should not be overlooked. If an outline is complete and well organized, the task of writing the SOW will be easier, and the quality of the SOW will be improved.

WRITE INITIAL DRAFT

Once the detailed outline is complete, the initial draft of the SOW can be written. This draft should closely parallel the outline. Using the outline, the SOW drafters should write quickly and not be too concerned with content. Content was considered in preparing the outline.

EDIT INITIAL DRAFT

After the initial SOW draft is complete, the writers need to edit it. They will look for such things as poor grammar and punctuation, ambiguities, wordiness, and the like.

CRITIQUE INITIAL DRAFT

When the writers have edited the SOW, it's a good idea to have someone else critique, or evaluate, it. The critique may be for either technical content or for grammar and the like. Have as many people critique the SOW as time permits, because no one person will be able to identify all of the ways a SOW can be improved.

Ambiguities are particularly difficult to locate. An ambiguity means there are differing interpretations of a word or phrase. So, the more people who critique the SOW, the better the chance of finding those different interpretations. After the critique is done, the initial draft is revised, considering all suggested changes.

REVIEW AND MODIFY THE INITIAL DRAFT

The next step in this SOW writing process may be called Team Review and Modification. The completed draft is circulated for comment and review to contract, legal, and quality control personnel.

Remember that the contractual and legal sufficiency of the SOW is essential, but this must not dilute the technical aspects of the requirement. The cycle of team review and modification may be repeated several times before the review process is completed.

WRITE THE FINAL VERSION

When all of the input has been received from the reviewers, the writers are ready to write the final version of the SOW.

After the final version is written, the SOW should be as close to “perfect” as possible.

INCORPORATE THE SOW INTO A SOLICITATION PACKAGE

The final step is to put the SOW into a solicitation package, which will eventually be sent to prospective contractors. The preparation of the solicitation package is normally the responsibility of the Contracting Officer.

UNIT 4 REVIEW EXERCISE #3

Answer the following questions. Then, check your answers against the ones in the [Answers](#) section.

- The seven basic elements in a SOW are listed in Column I. Match them with their descriptions in Column II.

<u>Column I</u>		<u>Column II</u>	
1. General description	_____	(A)	Government furnished property, data, or services
2. Technical requirements	_____	(B)	Known phenomena or techniques; special requirements (safety, security, travel)
3. Period of performance/ deliverables	_____	(C)	Description of deliverables (e.g., reports, data); period of performance
4. Progress and compliance	_____	(D)	Objectives, desired results of contract; scope; background information
5. GFP	_____	(E)	Includes statement of whether materials are included as background information or whether they set forth contractual obligations
6. Special considerations	_____	(F)	Description of tasks, subordinate tasks, phases
7. List of references and attachments	_____	(G)	Describes how progress/compliance will be assessed; QA provisions

2. In the left-hand column, list in order the nine steps in preparing the SOW by writing the letter of the appropriate step contained in the right-hand column.

Correct Order**Procedural Steps**

- | | |
|----------|--|
| 1. _____ | A. Research and gather data |
| 2. _____ | B. Write initial draft |
| 3. _____ | C. Determine requirement objectives and sub-objectives |
| 4. _____ | D. Critique the initial draft |
| 5. _____ | E. Write the requirement outline |
| 6. _____ | F. Edit the initial draft |
| 7. _____ | G. Write the final version |
| 8. _____ | H. Insert the SOW into a solicitation package |
| 9. _____ | I. Team review/modification |

UNIT 4 EXERCISE #3 ANSWERS

1. The seven basic elements in the SOW are listed in Column I. Match them with their descriptions in Column II. (See Page 4-21.)

Column I**Column II**

- | | |
|---|--|
| 1. General description | (D) Objectives, desired results of contract; scope; background information |
| 2. Technical requirements | (F) Description of tasks, subordinate tasks, phases |
| 3. Period of performance/
deliverables | (C) Description of deliverables (e.g., reports, data); period of performance |
| 4. Progress and compliance | (G) Describes how progress/compliance will be assessed; QA provisions |
| 5. GFP | (A) Government furnished property, data, or services |
| 6. Special considerations | (B) Known phenomena or techniques; special requirements (safety, security, travel) |
| 7. List of references and attachments | (E) Includes statement of whether materials are included as background information or whether they set forth contractual obligations |

2. In order, the nine steps in preparing the SOW are
- 1.—C—Determine requirement objectives and sub-objectives.
 - 2.—A—Research and gather data.
 - 3.—E—Write the requirement outline.
 - 4.—B—Write the initial draft.
 - 5.—F—Edit the initial draft.
 - 6.—D—Critique the initial draft.
 - 7.—I—Review and modify the initial SOW draft.
 - 8.—G—Write the final version.
 - 9.—H—Incorporate the SOW into a solicitation package.
- (See Page [4-22](#))

PREPARING A GOOD SOW

AFTER READING THE MATERIAL IN THIS SECTION AND COMPLETING THE REVIEW EXERCISES, YOU WILL BE ABLE TO—

- List types of improper SOW requirements provisions;
- Identify ambiguous phrases in a SOW;
- Identify grammatical and writing technique errors in a SOW.

CHARACTERISTICS OF A WELL-WRITTEN SOW

A good SOW should have these characteristics:

- It must be **clear**.
- It must be **complete**.
- It must be **concise**.
- It must be **specific** (precise).
- It must express **the functional needs** of the Government.

CLEAR

Clarity is important in writing the SOW. Its language must be unambiguous, not likely to be interpreted differently by different readers. Your meaning should be stated as precisely as possible. This will prevent the arguments, disagreements, and lawsuits that often accompany inferior SOWs.

Remember the “Rule of Ambiguity”: the burden of contract interpretation is on the “drafter” of the contract. Therefore, if a contract term is ambiguous, and the contractor’s interpretation of the term is “reasonable”, the ruling will be against the Government, as the drafter of the document. The Government bears the responsibility for any contract requirement that is deemed to be ambiguous.

COMPLETE

The SOW must contain enough information so that prospective contractors can estimate costs and calculate resources needed to fill the requirements. If any standard specifications, clauses, or provisions apply, they should be properly cited and referenced.

After contract award, the contractor should be able to perform the required work by reference to the SOW alone, without a lot of additional direction.

The SOW is interpreted by “what it says” not by “what it meant to say.” Requirements should be stated explicitly and not merely implied.

CONCISE

Brevity is important. Concise statements often prevent misreading or misinterpretation. The use of short words and phrases enables you to say what you mean effectively. But, if the reader’s understanding of the SOW can be improved by using more words, then use more words. In short, use the minimum of words necessary to convey the information.

SPECIFIC

The SOW should describe the requirements precisely. Its language must be specific enough to protect the Government but broad and flexible enough to encourage contractor interest and complete the contract under various circumstances.

The SOW language must allow objectively assessing contractor compliance. Both the contractor and the Government must be able to tell easily whether job has been done according to the contract.

EXPRESSES THE FUNCTIONAL NEEDS OF THE GOVERNMENT

Obviously, the SOW should express accurately the needs of the Government for this particular acquisition. Furthermore, it should express the *functional* needs and not confuse matters with “nice to have” items. The SOW should contain only the essentials and use only as many words as absolutely necessary to make the meaning clear.

WHAT TO AVOID

The purpose of the SOW is to communicate. How do we effectively communicate the Government’s needs in our SOW?

By using good technical writing techniques, correct grammar, and proper language, the SOW writer should have no problem stating the Government's needs in a way that avoids confusion.

However, the many inferior SOWs that exist today prove that there are still problems in writing practices. Let's examine the problems that might prevent us from communicating the Government's needs.

POOR REQUIREMENTS

The statement of the performance requirements in the SOW should be an accurate description of what the purchaser desires. It is the basis on which all of the parties involved with the SOW can identify the physical, functional, and technical characteristics of the service required.

Unfortunately, due to poor writing, lack of technical knowledge, carelessness, lack of common sense, and lack of communication (among designers, engineers, purchasers, writers, producers, and users), the requirements portion of the SOW has often been a trouble spot. The result is requirements that are (a) unrealistic, (b) restrictive, (c) inconsistent, (d) out-of-date, or (e) unenforceable.

Unrealistic Requirements

Unrealistic requirements specify design or performance characteristics that are impossible to meet or are more than needed. They are usually due to the purchaser's desire to obtain a superior product. This results in requirements that can't be met at all, or only met at a high price.

It's possible to have a realistic requirement that becomes unrealistic with the passing of time.

Example: A DOS contract for ammunition required total, or 100%, inspection. The method of testing was to fire the ammunition. The contract had to be modified to change the method of surveillance to random sampling because the total inspection method would have used up all of the ammunition.

Restrictive Requirements

Another problem is a restrictive requirement, which needlessly limits the methods of performance. It may require that a service use a particular method or process, be performed in a specific geographic region, or specify the use of a particular company.

Example: A furniture repair contract requires the use of animal glue to repair a stool. This is restrictive because it prohibits the use of synthetic glue, which would serve the same purpose.

Restrictive requirements greatly limit competition in contract award. For every restrictive feature in a SOW, there is probably an interested contractor who says, “If it weren’t for that one thing, I could do this job.” A restrictive feature prevents the use of other or less expensive methods.

Of course, avoiding restrictive requirements is one of the advantages of a performance-based approach to acquisition.

Inconsistent Requirements

Inconsistent or conflicting requirements may be mutually exclusive or require a third requirement to reconcile. In the conflicting requirement, two or more requirements are mutually exclusive. If the contractor complies with one requirement, he/she can’t fulfill the other requirement. Usually, these problems are the result of carelessness, such as typographical errors, writing mistakes, and lack of coordination among the various elements of the SOW. By simply reading, checking, and comparing the various parts of the SOW, you can remove the inconsistency.

Example: A DOS contract for cleaning services required the contractor to perform after 4:00 pm. Security regulations for the post required contractor personnel working in certain buildings to be accompanied by Government employees. For 12 months, Government personnel were paid overtime to sit in these buildings while the buildings were being cleaned. If the SOW writer had checked with Security before setting the hours of operation, the extra contract expense could have been avoided.

Out-Of-Date Requirements

Out-of-date requirements are those that are no longer applicable because of changes in technology, specifications, directives, documents or other circumstances. If out-of-date references are used in the SOW, the requirement is meaningless. Therefore, the SOW may become useless.

Out-of-date requirements should not be used to acquire supplies or services. Review and update SOW requirements from time to time (at least yearly) so that they remain valid and current. This should be done before exercising an option or issuing a new solicitation.

Example: A DOS post awarded a grounds maintenance contract without updating the performance work statement from past years. Large sections of land that had previously required grass mowing had been paved or had buildings on them. The contractor was paid the full amount of the contract even though no mowing was possible in those areas.

Unenforceable Requirements

A requirement is unenforceable if it is difficult or impossible to conduct quality assurance inspections to determine if the product is suitable for its intended use. Another type of unenforceable requirement is one that is illegal. A particular problem in service contracting is the Occupational Safety and Health Act (OSHA). A contractor should not be required to use Government facilities that do not meet OSHA standards.

WHAT NOT TO INCLUDE IN THE SOW

Do not include in the SOW provisions dealing with legal, financial, or contract administration issues. For example, matters related to cost/price estimate, the Government's option to extend, and type of contract should be discussed elsewhere in the solicitation. Instructions for submitting and preparing the proposal should also be separate from the SOW.

AMBIGUITY

One of the biggest causes of problems in SOWs is the use of indefinite or ambiguous words. Many words have several meanings, and the reader will define a word according to his/her own experience and needs. If you find it necessary to use an abstract term or phrase, you should use specific examples, illustrations, and definitions to clarify those terms and phrases.

Never include “catch-all” phrases with the intent of pretending that anything else the Government may think of later was already included in the SOW. The practice is tempting because it seems to make changes unnecessary—all one has to do is reinterpret the existing words. But such catch-alls are a trap for two reasons. First, they force contractors to pad their cost estimates. Second, they may give contractors reason to provide (and get paid for) things you do not want.

[Exhibit 4-2](#) lists a few ambiguous expressions that are troublesome in a SOW. This list isn't complete, so you must think carefully about using terms and phrases in your SOW that might be misinterpreted. The best advice is to be specific, and state what is required of the contractor in simple language that anyone could understand.

EXHIBIT 4-2: AMBIGUOUS WORDS & PHRASES—AVOID USING THESE!

- | | |
|--|--|
| 1. All reasonable requests of the Contracting Officer shall be complied with | 15. Metal parts shall be cleaned before painting |
| 2. As determined by the Contracting Officer | 16. Pleasing lines |
| 3. As directed by the Contracting Officer | 17. Practically free |
| 4. Carefully performed | 18. Properly assembled |
| 5. Convenient to operate | 19. Rapid heating |
| 6. Excessive use | 20. Reasonably clear |
| 7. Good materials | 21. Securely mounted |
| 8. Good working order | 22. Skillfully fitted |
| 9. Good workmanship order | 23. Smooth surfaces |
| 10. High quality | 24. Suitably finished |
| 11. In accordance with applicable published specifications | 25. Suitably housed |
| 12. In accordance with best commercial practice | 26. To the satisfaction of the Contracting Officer |
| 13. In accordance with best engineering practice | 27. Undesirable odor |
| 14. Installed in a neat and workmanlike manner | 28. Where practical |
| | 29. Within easy reach of the operator |
| | 31. Workmanship shall be of the highest quality |

SUGGESTIONS FOR WRITING

Many of the problems in developing a clear, concise SOW are related to grammar and language usage. The following suggestions may be helpful.

PRECISE AND MEANINGFUL LANGUAGE

Only precise and meaningful terms and phrases should be used in the SOW. They should describe requirements in terms of something that is capable of being measured objectively. Precise phrases such as “within 10 calendar days,” “mopped and vacuumed daily,” and “every 30 days” should be used. Imprecise phrases such as “very clean,” “acceptable manner,” “minimum time,” “maximum efficiency,” are ambiguous and should not be used.

TECHNICAL WRITING STYLE

“Style” refers to the particular manner of written expression that a writer uses, as opposed to the idea, or content, that is being conveyed. It is the way each writer expresses himself/herself in words, sentences, and paragraphs.

The style and grammar of the SOW is that of technical writing. Critics of this style of writing find it to be dull. However, the imaginativeness and originality desirable for writing a novel does not help make a SOW functional.

The SOW is written deliberately and with a specific intent. It is not designed to entertain or cause an emotional response from the reader. The writing style of the SOW should be unemotional and objective. The SOW is a vehicle to present facts in a clear and concise manner. The restrained style of technical writing does not mean to suggest that it lacks effective expression. On the contrary, simple prose permits the reader to fully concentrate on the facts presented.

OUTLINES

To be effective, writing must be well organized. The easiest way for you to arrange your material in a logical sequence is to develop an outline. This gives you a blueprint to follow. It helps you cover all important facts. Also, it helps you avoid repetition and contradiction.

LEGAL TERMS

Much of the language of early SOWs was of a legal nature. People felt that since the SOW was a legal document, legal terminology should be used. However, the trend is changing. The SOW is no place to show the extent of your knowledge of legal terminology.

SHALL

Although you should avoid using excessive legal terminology, always use the term “shall” to mean that a provision is binding or mandatory. “Should” or “will” or even “must” do not have the same legal impact.

VERBS

Using the emphatic form of the verb emphasizes that you are giving directions, not suggestions, to the contractor. Tell the contractor what he/she shall or shall not do.

Avoid using the passive voice. The passive voice leaves open to question who is to perform the act. Say “The contractor shall inspect the site” rather than “The site shall be inspected.”

MODIFIERS

Use adjectives and adverbs sparingly. Often modifiers soften the words they modify and make their meaning vague. For example, words such as “workmanlike”, “successful”, “substantial” and “adequate”, used to describe performance, tend to decrease rather than increase the contractor’s obligation.

PRONOUNS

The use of pronouns is usually regarded as dangerous in the SOW. It is better to repeat the noun and avoid misinterpretations.

ANY, EITHER, & AND/OR

These words imply that the contractor may make a choice. Avoid them unless a choice is to be made and you are willing to abide by the contractor’s choice.

NUMERALS

Since numerals are used on drawings and illustrations, it is desirable to use them in the SOW. Spell out the numbers one through nine unless such numbers are used in connection with time, money, or measurement. For example—

- \$1.98,
- 4:30 p.m.,
- 6 years old, or
- 9 inches.

ABBREVIATIONS & ACRONYMS

Abbreviations and acronyms can be useful to the writer because they are a form of shorthand. However, misunderstandings can arise from their use. The most common misunderstanding is a reader who is not familiar with the abbreviation or acronym used. Also, many abbreviations are used for several different words.

Common or standard abbreviations that are listed in dictionaries may be used. There are various Federal and military style manuals to follow. Generally, the first time an abbreviation or acronym is used in a text, it should be placed in

parentheses after the spelled-out word. This defines the abbreviation or acronym for further use. If the SOW is particularly long or complex, use an index of such terms at the beginning of the SOW.

UNIFORM TERMINOLOGY

Consistently use the same terms for the same things throughout the document. Using same words or phrases may seem dull, but it limits contradiction, confusion, and misinterpretation.

WORDINESS

Wordiness can be a problem, but it can be difficult to spot in your own writing. Avoid using pairs of words with similar meanings. Their use adds needless bulk to the SOW. Why write “important and significant” when “important” will do? Is it necessary to say “true facts”?

Use specific verbs. For example, don’t “make a choice.” Substitute the word “choose.” And, don’t “provide guidance” when the word “guide” will do.

If a word can be dropped without changing the meaning of your thought, drop that word.

NOUN STRINGS

Long strings of nouns and noun modifiers are distracting and can cause confusion. You may have to use official titles that are long strings, such as “Developing Countries and Trade Organizations Division.” However, don’t use unofficial ones. Don’t say “increased high cost area allowances.” Say “increased allowances for high cost areas.” Sometimes increasing the number of words can increase reading speed and enhance the reader’s understanding of the requirement.

ET CETERA

The abbreviation “etc.” can be very confusing if the reader doesn’t have some idea of the items missing from the series. This does not mean that “etc.” should not be used. However, don’t use “etc.” to cover up laziness or lack of information. Be specific. Reserve its use for those cases where spelling out the series of words is not necessary.

Don’t confuse “etc.” with “i.e.” or “e.g.” “Etc.” means “and so on.” “I.e.” means “that is to say.” “E.g.” means “for example.”

SPELLING

A misspelled word can break a reader's train of thought. In fact, the use of misspelled words can lead to a contract claim. Most words have only one acceptable spelling. But, throughout the English language, there are words that can be spelled more than one way. Avoid misunderstandings by using standard spellings, which is usually the first spelling noted in the dictionary.

PUNCTUATION

In order to keep the SOW clear, use simple, short, and concise sentences. If you accomplish that feat, you will need little punctuation. Well-planned word order requires minimal punctuation. If you have a lot of punctuation, rewrite the sentence. In particular, use commas carefully. A misplaced comma can alter the meaning of a sentence. It has been said that a misplaced comma can cost millions. Punctuation should improve readability and prevent misinterpretation.

SENTENCES

Construct crisp, concise, logical sentences using the simplest words you can. Rearrange long, involved sentences into short, simple sentences that are limited to a single idea or thought. Simple sentences should outnumber compound and complex sentences.

Good writing depends on natural word order. The word order of a sentence tells the reader the function of each word in a sentence. The simple sentences we want in the SOW are based on the traditional word order of subject-verb-object. Simple, standard word order improves clarity and reliability.

PARAGRAPHS

A paragraph states a single idea or fact and then elaborates on it. The statement of the single idea or fact—also called the topic sentence—is best placed at the beginning of the paragraph. This allows the reader to immediately grasp the idea. Other sentences are then added to the topic sentence to develop and support the original idea.

Try to keep paragraphs short. However, the paragraph must develop a single thought, and you must decide when your paragraph has accomplished that purpose.

But, remember: the central fact or idea should not be hidden in the middle of a paragraph.

REFERENCES

The SOW should reference only currently available documents.

Any requirements referenced in other documents should be pertinent to the task to be performed. The extent to which any referenced document applies should be clearly stated.

Do not reference an entire document (blanket referencing), unless the entire document clearly applies.

Documents referenced should be labeled as either “Mandatory” (contractor compliance is required) or “Advisory” (contractor compliance not required; provides suggested approaches.)

UNIT 4 REVIEW EXERCISE #4

Answer the following questions. Then, check your answers against the ones in the [Answers](#) section.

1. It's good to include in the SOW a general "catch all" requirement that will cover anything you might have forgotten.
True False
2. The Rule of Ambiguity states that, if more than one meaning can be reasonably inferred from a phrase or provision in a contract, then the court will hold in favor of the party who drafted the phrase or provision.
True False
3. This unit contains several lists. Below are all the items from nine of those lists combined into one list. Separate the items by writing the number of the items below to each list's heading.

LIST HEADINGS:

- (a) Government policy requires the SOW must...

- (b) Minimum functions of the SOW

- (c) Basic elements in the SOW

- (d) Components of a performance measure

- (e) Contents of a QASP

- (f) Methods of surveillance

- (g) Characteristics of a well-written SOW

- (h) Types of improper SOW requirements provisions

- (i) Ambiguous word and phrases

ITEMS:

- (1) 100% inspection
- (2) Acceptable Quality Level (AQL)
- (3) As determined by the Contracting Officer
- (4) Avoid restrictive features that limit acceptable offers to one or a few products
- (5) Background information
- (6) Clear
- (7) Complete
- (8) Concise
- (9) Contractor self-reporting
- (10) Customer Input
- (11) Define the way progress is to be measured and results are to be evaluated
- (12) Describe the “end product” or result
- (13) Expresses the functional needs of the Government.
- (14) General description of the requirement
- (15) Identify the work to be performed and set parameters for the scope
- (16) In accordance with best commercial practice
- (17) Incentives

- (18) Inconsistent requirements
- (19) Indicator (the quality that is to be measured)
- (20) Outcomes and related tasks that the contractor must perform
- (21) Out-of-date requirements
- (22) Performance standard (the definition of good performance, the goal)
- (23) Performance standards and AQL for each outcome
- (24) Periodic inspection
- (25) Quality assurance provisions
- (26) Random sampling
- (27) Reporting requirements/deliverable items
- (28) Restrictive requirements
- (29) Special considerations
- (30) Specific
- (31) State functional needs in a form that permits maximum competition and innovation
- (32) State only the “functional needs” of the Government
- (33) State the objectives of the acquisition
- (34) Surveillance method to be used by the Government
- (35) Technical considerations
- (36) Technical requirements
- (37) Unenforceable requirements
- (38) Unrealistic requirements
- (39) Where practical

UNIT 4 EXERCISE #4 ANSWERS

1. **FALSE.** Explanation: The Rule of Ambiguity states that, if more than one meaning can be reasonably inferred from a phrase or provision in a contract, then the court (or board) will hold against the party who drafted the phrase or provision. (See Page 4-4.)
2. **FALSE.** “Catch-alls” should never be used because they force contractors to pad their cost estimates may give contractors reason to provide (and get paid for) things you do not want. (See Page 4-33.)
3. The lists are as follows.
 - a. Government policy requires (Page 4-2) that plans, drawings, specifications, and purchase descriptions must—
 - (32) State only the “functional needs” of the Government;
 - (31) State functional needs in a form that permits maximum competition and innovation; and
 - (4) Avoid restrictive features that limit acceptable offers to one or a few products, unless the restrictions are essential to meeting the Government’s functional needs.
 - b. Minimum functions of the SOW (Page 4-20): It must—
 - (33) State the objectives of the acquisition;
 - (15) Identify the work to be performed and set parameters for the scope;
 - (11) Define the way progress is to be measured and results are to be evaluated; and
 - (12) Describe the “end product” or result.
 - c. The seven basic elements (Page 4-21) to be considered in preparing the SOW are:
 - (14) A general description of the required objectives and desired results,
 - (5) Background information helpful to a clear understanding of the requirements and how they evolved,

- (35) Technical considerations, such as any known phenomena or techniques,
 - (36) A description of the technical requirements and subordinate tasks,
 - (27) A description of reporting requirements and any other deliverable items, such as data,
 - (25) Quality assurance provisions, to determine the contractor's degree of compliance with SOW requirements, and
 - (28) Any other special considerations.
- d. There are typically three components to a performance measure (Page 4-12):
- (19) An indicator (the quality that is to be measured).
 - (22) The performance standard (the definition of good performance, the goal).
 - (2) The acceptable quality level (AQL) (How much error we can accept?).
- e. The QAP/QASP (Page 4-15) should include—
- (20) The outcomes and related tasks that the contractor must perform;
 - (23) The performance standards and AQL for each outcome, which may include multiple tasks;
 - (34) The surveillance method to be used by the Government; and
 - (17) Incentives.
- f. Methods of surveillance (Page 4-16) include—
- (1) 100% inspection (this is recommended only where health and safety are at issue; otherwise it is not cost-effective and is too stringent);
 - (26) Random sampling (good for recurring tasks/requirements);
 - (24) Periodic inspection (use a predetermined plan based on analyses of agency resources and requirements);

- (10) Customer input (good service-oriented tasks; use a standard form); and
 - (9) Contractor self-reporting.
- g. The characteristics of a well-written SOW (Page 4-29) are:
 - (6) It must be clear.
 - (7) It must be complete.
 - (8) It must be concise.
 - (30) It must be specific (precise).
 - (13) It must express the functional needs of the Government.
- h. The five types of improper SOW requirements provisions (Page 4-31) are:
 - (38) Unrealistic requirements,
 - (28) Restrictive requirements,
 - (18) Inconsistent requirements,
 - (21) Out-of-date requirements, and
 - (37) Unenforceable requirements.
- i. Ambiguous phrases (Page 4-34) include:
 - (3) As determined by the Contracting Officer
 - (39) Where practical
 - (16) In accordance with best commercial practice

UNIT 4 SUMMARY

A well-written SOW is CLEAR, COMPLETE, CONCISE, SPECIFIC; and it EXPRESSES THE FUNCTIONAL NEEDS of the Government.

It is important that the SOW be well written during the period before contract is awarded. A well-written SOW increases competition and tends to improve the quality of proposals in response to the solicitation.

After contract award, a well-written SOW enables both the Government and the contractor to know exactly when the requirements are fulfilled.

The language of the SOW must never be ambiguous. The **Rule of Ambiguity** states that, if more than one meaning can be reasonably inferred by a phrase or provision, the board or court will rule against the drafter of the phrase or provision—namely, the Government.

Requirements documents can be grouped as follows:

- Specifications (usually describe goods)
- Statements of Work (usually describe services)
 - Design SOWs
 - Performance Work Statements (PWS)

A design SOW provides a precise statement of the work to be performed and it details how the contractor must accomplish that work. The Doctrine of Implied Warranty is the legal principle that specifying how the work is to be performed implies that the Government is guaranteeing that it will accept the results as long as the contractor follows the instructions—regardless of whether those results suit the Government's purposes.

The PWS is the preferred type of work statement for most services. It describes to prospective contractors what are the objectives to be accomplished, the goal or the desired achievement. It does not tell the contractor how to accomplish the requirement.

In a performance-based acquisition, performance measures are used to evaluate contractor performance and compliance with the terms and conditions of the contract. Performance measures consist of—

- An indicator (the quality that is to be measured).
- The performance standard (the definition of good performance, the goal).
- The acceptable quality level (AQL) (How much error we can accept?).

Performance measures become part of a Quality Assurance Plan (QAP) or Quality Assurance and Surveillance Plan (QASP), which explains what work will be inspected and how it will be inspected. It may also prescribe incentives for better performance in the form of percentages that can be added or deducted from the contractor's payment depending on how closely performance meets the standards.

At a minimum, every SOW should—

- State the objectives of the acquisition;
- Identify the work to be performed and set parameters for the scope; and
- Define the way progress is to be measured and results are to be evaluated.

The SOW must include these elements:

- General description (background, objective, scope).
- Technical requirements (definition of requirements, tasks, phases).
- Period of performance and deliverables/end products.
- Progress and compliance (how it will be assessed; includes reports and procedures for inspection and acceptance).
- Government furnished equipment, data, or services.
- Special considerations.
- References and attachments.

The SOW Writing Team should follow these nine procedural steps in preparing the SOW:

1. Determine requirement objectives and sub-objectives.
2. Research and gather data.
3. Write the requirement outline.

4. Write the initial draft.
5. Edit the initial draft.
6. Critique the initial draft.
7. Review and modify the initial SOW draft.
8. Write the final version.
9. Incorporate the SOW into a solicitation package.

A well-written SOW is—

- Clear;
- Complete;
- Specific; and it
- Expresses the functional needs of the government.

It must not contain requirements that are unrealistic, restrictive, inconsistent, out-of-date, or unenforceable.

It must be written in language that is simple and concise. It should never be ambiguous.

REMINDERS TO CORs

As a COR, you should remember the following points:

- **DO** use clear and concise language in writing a PWS.
- **DO** express the Government's actual functional needs when writing the SOW.
- **DO** use performance language and measurable goals in the PWS.
- **DO** have justification for any design language used.

UNIT 5 — CONTRACT ADMINISTRATION

UNIT OBJECTIVES

AFTER READING THE MATERIAL IN THIS UNIT AND COMPLETING THE REVIEW EXERCISES, YOU WILL BE ABLE TO—

- List the types of information required for COR files;
- List post-award orientation activities;
- Identify tasks associated with the COR's role in inspecting and accepting supplies and services;
- List the tasks associated with the COR's role in monitoring expenditures; and
- List COR responsibilities with regard to compliance with the Prompt Payment Act.

IMPORTANCE OF UNIT TO COR

CORs play an important role in making sure the Government gets what it pays for. Although the administration of a contract is ultimately the responsibility of the Contracting Officer, the COR functions as the technical representative of the Contracting Officer, staying in close communication with the Contracting Officer and relaying any information affecting contractual commitments and requirements.

As a COR, you will have responsibilities related to documenting events that occur, assisting with the post-award conference, inspection and acceptance of deliverables, monitoring expenditures, processing payments to the contractor, and communicating with the contractor.

INTRODUCTION TO CONTRACT ADMINISTRATION

The goal of contract administration is to ensure that the contract is performed as written by both the contractor and the Government. There are two important points in this statement:

- *The contract is to be performed as it is written.* The key word here is “WRITTEN.” It is important to understand that when the Government acts as a party to a contract, its authority to direct the actions of a contractor rest solely in the written words of the contract.
- *The contract is to be performed by both the contractor and Government.* Clearly, monitoring the contractor’s performance is one of the most vital elements of contract administration. Government personnel also have a responsibility to ensure the Government fulfills its contractual obligations.

Contract administration begins with the award of a contract and ends with the administrative actions taken at contract closeout.

THE COR’S ROLE IN CONTRACT ADMINISTRATION

Ultimately, the administration of a contract is the responsibility of the Contracting Officer, who is the only person who may modify the contract or take action to enter into or change a contractual commitment on behalf of the Government. However the COR plays an important role in contract administration. He or she functions as the technical representative of the Contracting Officer and stays in close communication, relaying any information affecting contractual commitments and requirements.

COR CONTRACT ADMINISTRATION FUNCTIONS

Generally, the Contracting Officer authorizes the COR to independently perform the following functions:

- (1) Correspond directly with the contractor. (Copies of all correspondence are sent to the Contracting Officer.)
- (2) Conduct on-site visits.
- (3) Hold conferences with the contractor.
- (4) Approve all technical data submitted by the contractor.
- (5) Provide direction to the contractor in technical matters (within the scope of the contract as written—must not affect cost, period of performance, or other terms and conditions of the contract)
- (6) Approve invoices for payment.

In addition to exercising delegated authorities, the COR is expected to:

- (1) Advise and assist the Contracting Officer in administering the business aspects of the contract—reviewing vouchers, invoices, reports, and deliverables.
- (2) Maintain a file documenting significant actions and containing copies of trip reports, correspondence, and reports and deliverables received under the contract.
- (3) Coordinate requirements office decisions relating to the contract.
- (4) Prepare final summary statements for contract closeout.

COR CONTRACT ADMINISTRATION DUTIES

In particular, the COR's duties typically include—

- Reading the contract;
- Setting up a COR file;
- Assisting the Contracting Officer in the post-award orientation conference, if held;
- Assuring that contractor does the work called for;
- Assuring quality;
- Assuring timely performance;
- Assuring performance within budget (cost type contracts);
- Assuring performance along most beneficial lines of effort;
- Approving payment for satisfactory performance;
- Documenting and keeping the Contracting Officer apprised of unsatisfactory performance;
- Acting as liaison with contractor and Contracting Officer;
- Making final determination of technical acceptability;
- Recommending disposition of Government-furnished property; and;
- Recommending final settlement, if necessary.

CONTRACT FILES

AFTER READING THE MATERIAL IN THIS SECTION AND COMPLETING THE REVIEW EXERCISES, YOU WILL BE ABLE TO—

- Identify at least three reasons for maintaining complete, accurate, and current COR records; and
- Identify minimal COR record-keeping requirements.

OFFICIAL CONTRACT FILE

The Contracting Officer maintains the official contract file in accordance with [FAR Subpart 4.8](#) and [DOSAR 604.8](#). If the COR is also the Contracting Officer, then he/she only needs to maintain the official contract file; a separate COR file is not necessary.

The official contract file contains more information than the COR file generally contains. As such, should there ever be a problem during the award or administration of a contract, the Government will rely on the information contained in the official contract file.

Of course, this makes it imperative upon the COR to provide the Contracting Officer with copies of any correspondence between the COR and the contractor.

COR FILES

The COR must set up and maintain a file for each contract under his/her administration. This file's purpose is twofold:

- To provide easy access to technical contract information and work progress; and
- To ease the transition to a new COR if one is appointed during the life of a contract.

Each file must be clearly indexed and must contain copies of—

- (1) Complete Procurement Request Package;
- (2) Solicitation and any amendments to it;
- (3) Technical and cost proposals (with modifications) submitted by the winning contractor;

- (4) Copy of the contractor's approved work plan, if required;
- (5) Copy of the contract and all modifications to it;
- (6) Copies of all progress reports submitted by the contractor;
- (7) Copies of all correspondence and synopses of telephone calls to and from the contractor;
- (8) Interim and final technical reports or other products;
- (9) Documentation of acceptability/unacceptability of deliverables;
- (10) Documentation of on-site visit results;
- (11) Copies of any memoranda regarding periodic performance affecting payment;
- (12) Copies of all invoices/vouchers and a payment register indicating the balance of funds remaining;
- (13) COR's final assessment of contract performance; and
- (14) Any other pertinent materials or information.

The COR must provide to the Contracting Officer copies of all material which he or she authors. The requirements office is responsible for developing a procedure for the retention or retirement of technical files and products, including the COR file.

SUSPENSE FILES

In order for you to set up proper files, you must understand what is required by the terms and conditions of the contract. You should read and outline the requirements of any contract you will be monitoring. Then, set up a suspense file system to advise the Contracting Officer of the contractor's failure to complete acceptable performance or delivery in accordance with the contract schedule or provisions.

CORRESPONDENCE

The COR should personally sign all COR-originated correspondence or other COR-originated documents, transmitted to the contractor or Contracting Officer, which deal with the contract. The COR should use his/her name and title followed by the words, "Contracting Officer's Representative."

All correspondence should reference the contract number. Usually the COR is required to furnish the Contracting Officer with copies of all correspondence originating from the COR.

DISPOSITION OF COR FILES

The requirements office is responsible for developing a procedure for the retention or retirement of the COR file.

UNIT 5 REVIEW EXERCISE #1

Answer the following questions. Then, check your answers against the ones in the [Answers](#) section.

1. The goal of contract administration is to ensure the contractor fulfills its obligations under the written contract. Ensuring the Government fulfills its obligations is the contractor's responsibility.
True False
2. The COR is responsible for maintaining the official contract file.
True False
3. Which of the following is *not* required to be kept in the COR files?
 - a. A copy of Technical Reports.
 - b. A copy of any modifications to the contract.
 - c. A copy of the Contracting Officer's Certificate of Appointment.
 - d. Correspondence to and from the Contracting Officer.
 - e. All of the above.
4. The Contracting Officer is responsible for setting up the COR file system.
True False
5. A suspense file is used to monitor the COR's performance.
True False
6. The requirements office is responsible for developing a procedure for retention or retirement of the COR file.
True False

UNIT 5 EXERCISE #1 ANSWERS

1. **FALSE** Explanation: The goal of contract administration is to ensure that the contract is performed as written by both the contractor and the Government. (See Page 5-1.)
2. **FALSE** Explanation: The Contracting Officer is responsible for maintaining the official contract file. (See Page 5-4.)
3. Which of the following is *not* required to be kept in the COR files?
 - a. A copy of Technical Reports.
 - b. A copy of any modifications to the contract.
 - c. **A copy of the Contracting Officer's Certificate of Appointment.** (See Page 5-4.)
 - d. Correspondence to and from the Contracting Officer.
 - e. All of the above.
4. **FALSE.** Explanation: The COR is responsible for setting up the COR file system. (See Page 5-4.)
5. **FALSE.** Explanation: A suspense file is used to monitor the contractor's performance. (See Page 5-5.)
6. **TRUE.** Explanation: The requirements office is responsible for developing a procedure for retention or retirement of the COR file. (See Page 5-6.)

POST-AWARD ORIENTATION

The purpose of post-award orientation is to—

- Ensure the contractor understands contract requirements;
- Delineate the roles of Government personnel; and
- Explain the procedures that will be followed in administering the contract.

The Contracting Officer decides what types of post-award orientation activities are necessary. He or she will consider factors such as the size, type, and complexity of the contract; acquisition history of the product or service; history of the contractor's performance; urgency of the schedule; and extent of subcontracting.

The types of orientation activities the Contracting Officer might choose are—

- **Letters** or some other form of written communication. Used in relatively simple acquisitions. The Contracting Officer may send a letter that identifies the Government's contract administration officials and any special or unusual requirements.
- **Conferences.** Used if there are any indications the contractor lacks a clear understanding of the contract requirements, or if the contract work is complex.

If a conference is held, the Contracting Officer will be responsible for—

- Establishing the time and place for the conference;
- Preparing the agenda;
- Notifying appropriate Government representatives and the contractor;
- Chairing the conference;
- Conducting a preliminary meeting of Government personnel; and
- Preparing a summary report of the conference.

The Contracting Officer may ask the COR to assist with these responsibilities.

Government administrative personnel should meet before the conference to formulate the agenda. Matters the conference agenda might include are:

- a. Clarification of the specifications or the contents of the Statement of Work and/or identification of ambiguous clauses.
- b. Clarification of special contract terms/clauses.
- c. Reporting requirements and procedures for monitoring and measuring progress.
- d. Billing, voucher approval, and payment procedures.
- e. Quality control and testing requirements.
- f. Discussion of lines of authority, i.e., COR responsibilities versus Contracting Officer responsibilities.
- g. Furnishing and control of Government property, if applicable.
- h. Anticipated problem areas.

UNIT 5 REVIEW EXERCISE #2

Answer the following questions. Then, check your answers against the ones in the [Answers](#) section.

1. The Contracting Officer's decision to hold a post-award conference indicates the contractor is thought to be incompetent or unreliable.

TrueFalse

2. Which of the following are matters that might be on the agenda for a post-award conference.
 - a. Clarification of special contract terms/clauses.
 - b. Reporting requirements and procedures for monitoring and measuring progress.
 - c. Evaluation factors and the selection process for the acquisition.
 - d. Billing, voucher approval, and payment procedures.
 - e. Quality control and testing requirements.
 - f. Discussion of lines of authority, i.e., COR responsibilities versus Contracting Officer responsibilities.
 - g. Furnishing and control of Government property, if applicable.
 - h. Anticipated problem areas.

UNIT 5, EXERCISE #2 ANSWERS

1. **FALSE.** Explanation: The Contracting Officer holds a post-award conference if there are any indications the contractor lacks a clear understanding of the contract requirements, or if the contract work is complex. (See Page 5-8.)
2. Matters the conference agenda might include are:
 - Clarification of the specifications or the contents of the Statement of Work and/or identification of ambiguous clauses.
 - Clarification of special contract terms/clauses.
 - Reporting requirements and procedures for monitoring and measuring progress.
 - Billing, voucher approval, and payment procedures.
 - Quality control and testing requirements.
 - Discussion of lines of authority, i.e., COR responsibilities versus Contracting Officer responsibilities.
 - Furnishing and control of Government property, if applicable.
 - Anticipated problem areas.

But not **c**, Evaluation factors and the selection process for the acquisition. (See Page 5-10.)

INSPECTION AND ACCEPTANCE

INSPECTION

The Government is entitled to receive exactly what the contract requires. To enable the Government to determine that it is getting what was ordered, the standard “Inspection” clause gives the Government the right (but not the obligation) to inspect what is being generated under the contract. Inspection is to be carried out—

- To the extent practicable and at reasonable times and places, including the period and place of manufacture;
- In any event, prior to acceptance.

Personnel responsible for inspection and acceptance must become thoroughly familiar with—

- Specifications or other descriptions of the supplies or services required by the contract;
- The Inspection clause ([Exhibit 5-1](#)) applicable to the specific contract type and supplies or services being procured.

If inspection on a fixed-price contract reveals defects or deficiencies in supplies or services, the Government has a right to correction or replacement of a defective article.

Or, if that is not feasible within the delivery schedule, the Government may accept the articles but at an equitable reduction in price.

If none of these remedies is suitable, the contract may be terminated for default.

Where a rejection occurs, it must be in *writing*. Notices of rejection must be issued in a timely fashion since, under some circumstances, a delay may legally imply acceptance.

EXHIBIT 5-1: KEY ELEMENTS OF THE INSPECTION CLAUSES

Key elements of the Inspection clauses are:

Key Element	Clause
<i>Contractor shall provide and maintain an inspection system that is acceptable to the Government.</i>	All Clauses
<i>Contractor shall tender to the Government only supplies that have been inspected and found to conform with contract requirements.</i>	Supplies – Fixed-Price
<i>Contractor shall prepare, maintain and make available to the Government records of all inspections.</i>	All Clauses
<i>Government may perform reviews for compliance with record keeping requirements.</i>	All Clauses
<i>Government has the right to inspect and test all supplies and services called for by the contract.</i>	All Clauses
<i>Government shall perform inspections in a manner that will not unduly delay the work.</i>	All Clauses
<i>The Government assumes no obligation to perform inspection for the benefit of the contractor unless stipulated in the contract.</i>	Supplies – Fixed-Price
<i>If Government inspection is performed on contractor premises, the contractor shall provide reasonable facilities and assistance without charge.</i>	Supplies and R& D Clauses
<i>Government may charge the contractor for additional cost or inspection when supplies are not ready at the time specified by the contractor.</i>	Supplies and Construction Fixed-Price
<i>Government may charge the contractor for additional cost of inspection when prior rejection makes re-inspection necessary.</i>	Supplies and Construction Fixed-Price
<i>Government has the right to reject or require correction of nonconforming supplies or work.</i>	Supplies, Construction and R&D Clauses

Key Element	Clause
<i>The Government shall accept or reject supplies as promptly as practicable after delivery.</i>	Supplies, Construction and Fixed-Price R&D Clauses
<i>Inspections by the Government do not relieve the contractor of the responsibility for defects or other failures to meet contract requirements discovered before acceptance.</i>	Supplies, Construction and Fixed-Price R&D Clauses
<i>Acceptance by the Government shall be conclusive except for latent defects, fraud, or gross mistakes amounting to fraud.</i>	Supplies, Construction and Fixed-Price R&D Clauses
<i>When defects in services cannot be corrected by re-performance, the Government may reduce the contract price or fee to reflect the reduced value of services received.</i>	Service Contract Clauses

ACCEPTANCE

Acceptance is defined in the FAR as “the act of an authorized representative of the Government by which the Government ... assumes ownership of existing and identified supplies tendered or approves specific services...” ([FAR 46.101](#))

Formal acceptance normally requires that an authorized official execute an acceptance document, ordinarily on the applicable inspection and receiving report form. It should be noted that acceptance is conclusive except for latent defects, fraud, or gross mistake amounting to fraud. Latent defects and fraud or gross mistake amounting to fraud are discussed below.

NOTIFICATION OF REJECTION

To exercise its right of rejection, the Government of must notify the contractor of the rejection. The notice should be prepared by the Contracting Officer and—

- Be in writing;
- Specifically identify what is rejected;

- Identify the basis for rejection—the specific failure to conform to contract requirements;
- State what corrective action is required;
- State whether correction should be made at the Government facility.

Unless the contract says otherwise, acceptance or rejection must be made as promptly as practicable after delivery.

Inspection of partial products or work in process does not relieve the contractor from the responsibility for correcting defects discovered prior to acceptance of the final product or the completed work. Furthermore, Government failure to inspect, and to accept or reject, does not relieve the contractor from responsibility for a defect.

REVOCATION OF ACCEPTANCE

Even after an item has been accepted, the Government has the right to require correction of certain defects. The Inspection clause states: “Except as otherwise provided in this contract, acceptance shall be conclusive except as regards to latent defects, fraud, or such gross mistakes as to amount to fraud.” Correction of the acceptance is done after the Contracting Officer issues a formal “Notice of Revocation”.

LATENT VERSUS PATENT DEFECTS

A **patent** defect is one that is reasonably discoverable by normal methods. A **latent** defect is one that the Government could not reasonably be expected to discover by using normal methods in the course of its inspection. It is not necessary for the latent defect to be *impossible* to discover. A defect discoverable by X-ray would be a latent defect if X-ray inspection were not normally used to inspect the kind of supplies involved. In distinguishing these kinds of defects, it does not matter that the contractor could readily have discovered the defect. Government personnel who conduct day-to-day, on-site inspection under a contract are especially qualified to provide technical advice on whether a defect discovered after acceptance is patent or latent.

FRAUD AND GROSS MISTAKES AMOUNTING TO FRAUD

The Government has the right to reject after acceptance if the contractor’s conduct with respect to the defect involves fraud or a gross mistake amounting to fraud.

Fraud occurs when a contractor intentionally misrepresents a material fact that causes the acceptance of defective contract items. In order for the Government to obtain relief based on fraud, the Government must prove that the contractor intended to deceive. Since it is extremely difficult to establish intent, this recourse is usually not practical. However, if the COR suspects fraud, he/she should immediately bring this to the attention of the Contracting Officer. The Contracting Officer will request an investigation by the Office of the Inspector General.

A gross mistake amounting to fraud includes the same elements as fraud, except that intent is not involved. To have recourse against the contractor, the Government must show that acceptance was induced by a major mistake (one so serious that no responsible contractor would be reasonably expected to make).

OTHER CONTRACT PROVISIONS

If provided for elsewhere in the contract and despite Inspection clause rules, the Government maintains the right of rejection after acceptance for defective supplies and services. This holds true, even though the defect is patent and even though acceptance was not induced by fraud or gross mistake. These rights are sometimes granted in the form of guarantees or warranties.

REMEDIES WHEN ACCEPTANCE IS REVOKED

When acceptance is properly revoked, the Government's remedies for defects are the same as when defects are discovered before acceptance (see section on [Inspection](#), above).

QUALITY ASSURANCE PROGRAMS & CONTRACT QUALITY REQUIREMENTS

Quality assurance (QA) is a broad term. It encompasses inspection prior to acceptance and all of the surveillance and related activities of the Government that take place during performance of the contract through final acceptance. Quality assurance activities include examining the adequacy of the contractor's inspection/quality control system, inspecting services and reporting on performance.

POLICY

When the Government purchases supplies or services, the requirements or quality assurance office is responsible for determining the level of contract quality requirements necessary to ensure a satisfactory quality program.

The Contracting Officer must include appropriate Federal Acquisition Regulation (FAR) clauses in solicitations and contracts, which give the Government the right to inspect and accept or reject items in order to ensure it will receive exactly what it contracted for.

The clauses contain provisions delineating the rights and obligations of the parties to a contract. They define when and where inspection takes place, who bears the costs of inspection, when acceptance must occur, and the rights of the parties should the items not conform to specifications.

The contractor is responsible for carrying out its obligations under the contract by—

- Controlling the quality of supplies or services;
- Tendering to the Government for acceptance only those supplies or services that conform to contract requirements;
- Ensuring that vendors or suppliers of raw material, parts, components, subassemblies, etc., have an acceptable quality control system; and
- Maintaining evidence, when required, that the supplies or services conform to contract quality requirements.

WARRANTIES

DEFINITION OF WARRANTY

A warranty is an agreement by the contractor that it will be liable for meeting the contract specifications for a stated period of time after acceptance.

The Government is afforded some protection against defects after acceptance by including warranty clauses in a contract. It is particularly useful if inspections and tests may not adequately assure the Government that the articles will perform according to the specifications.

However, warranties do not come free. There is an implicit cost associated with a warranty. Offerors will normally propose a higher price if their work must be warranted than they would propose if the warranty was not required. The actual cost of a warranty is difficult to estimate, but some consideration should be given to the benefits to be obtained from a warranty versus its cost before including warranty requirements in a contract.

Warranties are categorized as either **express warranties** or **implied warranties**.

EXPRESS WARRANTIES

The standard Inspection clauses provide that acceptance shall be final, “except as otherwise provided in this contract.”

“As otherwise provided” is an exception to the finality of acceptance and refers to the express warranty clauses. Not all Government contracts contain warranty clauses.

While express warranties may increase a contractor’s liability for defects, either as to scope or time, or both, contractors can be expected to consider the costs of warranties in making offers on contracts. The FAR prohibits the inclusion of warranty clauses in cost reimbursement contracts. For other contracts, FAR lists criteria to be considered by Contracting Officers in determining whether a warranty is appropriate for a specific acquisition.

IMPLIED WARRANTIES

Implied warranties are warranties implied by the general law of sales. The standard inspection clauses (which provide that acceptance is conclusive except for latent defects, fraud, gross mistakes amounting to fraud, or as otherwise contractually provided) exclude implied warranties (FAR 46.706(b)(1)(iii)).

Implied warranties, for the most part, come in two major varieties: implied warranty of merchantability or fitness for particular purpose.

They are defined as a *promise arising by operation of law, that something which is sold shall be merchantable and fit for the purpose for which the seller has reason to know that it is required.*

Unless excluded or modified, a warranty that the goods must be merchantable is implied in a contract for their sale, if the seller is a merchant with respect to goods of that kind.

“Implied warranty of merchantability” or “implied warranty that goods are merchantable” means that the consumer goods meet each of the following:

- Pass without objection in the trade under the contract description;
- Are fit for the ordinary purposes for which such goods are used;
- Are adequately contained, packaged, and labeled;
- Conform to the promises or affirmations of fact made on the container or label.

“Implied warranty of fitness” means that when the retailer/distributor/manufacturer has reason to know any particular purpose for which the consumer goods are required, and that the buyer is relying on the skill and judgment of the seller to select and furnish suitable goods, then there is an implied warranty that the goods must be fit for such purpose.

SCOPE OF WARRANTY CLAUSES

The type of defect covered depends on the nature of the warranty clause. The standard supply warranty clause covers defects in material and workmanship; in addition, the contractor warrants that supplies and packaging conform to specifications.

When performance specifications or designs are of major importance, a different clause is used in fixed price supply and service contracts. This clause covers any condition or characteristic in any supplies, including related technical data or services that are not in conformity with the contract. The standard services warranty clause covers defects in workmanship or design existing at the time of acceptance. The construction warranty clause covers defects in material, equipment, and design furnished or workmanship performed by the contractor and its subcontractors and suppliers.

If the type of defect is covered by the warranty clause, it is immaterial whether the defect is labeled latent or patent. Since the contractor warrants that the goods are free from defects, the contractor is liable for defects even though they should have been discovered by inspection prior to acceptance.

The contractor is liable under a warranty clause only for those defects covered by warranty. The various warranty clauses provide guarantees against different types of defects. They also vary as to which causes of defects will make the contractor liable.

The broadest warranties are those covering design and performance. Generally, the contractor is liable under design or performance warranties for defects resulting from any causes other than improper Government conduct or vandalism. Improper operation of an item by the Government, therefore, negates a warranty, as does improper maintenance or handling.

If the warranty contains special requirements, such as specified preservation and packaging, Government failure to comply will result in loss of coverage; the warranty will be destroyed. The Government also loses the protection of a warranty if it alters the warranted product.

UNIT 5 REVIEW EXERCISE #3

Answer the following questions. Then, check your answers against the ones in the [Answers](#) section.

1. Match the following:

Column I

- _____ (1) acceptance
- _____ (2) latent defect
- _____ (3) guarantees
and warranties
- _____ (4) patent defect

Column II

- A. A defect discoverable by normal methods.
- B. Sometimes give the Government the right to reject after acceptance.
- C. A defect that cannot reasonably be discovered by normal methods.
- D. The act of an authorized representative...by which the Government... assumes ownership of supplies...or services.

2. The Government must accept or reject promptly.

True

False

3. Formal acceptance normally requires that an authorized official execute an acceptance document.

True

False

4. The COR signs the notice of rejection.

True

False

5. “Quality assurance” includes inspection, surveillance, and other Government activities through final acceptance.

True

False

6. The contractor must always offer “warranty” clauses.
True False
7. Express warranties may increase a contractor’s liability for defects.
True False
8. The narrowest warranties are those that cover design and performance.
True False
9. Express warranties are implied by the general law of sales.
True False

UNIT 5 EXERCISE #3 ANSWERS

1. The answers in Column I are as follows:

D	1. Acceptance (See Page 5-15)
C	2. Latent defect (See Page 5-16)
B	3. Guarantees and warranties (See Page 5-18)
A	4. Patent defect (See Page 5-16)
2. **TRUE.** Explanation: The Government must accept or reject promptly. (See Page 5-16)
3. **TRUE.** Explanation: Formal acceptance normally requires that an authorized official execute an acceptance document. (See Page 5-15)
4. **FALSE.** Explanation: The C O signs the notice of rejection. (See Page 5-15)
5. **TRUE.** Explanation: “Quality assurance” includes inspection, surveillance, and other Government activities through final acceptance. (See Page 5-17)
6. **FALSE.** Explanation: The contractor does not always have to offer “warranty” clauses. (See Page 5-18)
7. **TRUE.** Explanation: Express warranties may increase a contractor’s liability for defects. (See Page 5-19)
8. **FALSE.** Explanation: The broadest warranties are those that cover design and performance. (See Page 5-20)
9. **FALSE.** Explanation: Implied warranties are implied by the general law of sales. (See Page 5-19)

ROLE OF THE COR IN MONITORING EXPENDITURES

When the Government awards a firm fixed-price contract, the contractor has a strong incentive to perform the contract in the most economical way. Every penny saved below the contract price is additional profit.

Under most cost-reimbursement contracts, however, the contractor has little if any incentive to perform in the most economical way. It is generally entitled to compensation for costs incurred in doing the work, provided that the expenses are not unreasonable. Moreover, the work description in such contracts is usually broad because it is difficult to define just what the contractor is required to do.

This gives the contractor broad contractual authorization, which can permit the contractor to perform, and charge for, effort along lines other than those the Government may want to pursue.

Under a cost-reimbursement contract, the COR needs to monitor and guide the contractor's efforts in order to prevent waste of public funds and get the services needed within the amount budgeted by the requirements office.

Inefficient or misguided performance can result in other contracts or programs being "robbed" to provide additional funding, with an adverse effect on the Government's overall program objectives.

MONITORING AND CONTROLLING TO AVOID WASTE

The Government relies primarily on the COR to track and guide the contractor's activities so as to conserve funds. Techniques available to the COR for performing this aspect of contract administration are described below.

REVIEWING CONTRACTOR BILLINGS

COR review of contractor billings under cost reimbursement type contracts and labor-hour contracts offers a particularly effective means of identifying waste. Under these contracts, the COR is entitled to ask the contractor for information needed in determining whether the charges billed are reasonable, allocable, and allowable, which are the basic tests the contractor's costs must pass in order to be reimbursable by the Government.

If it appears to the COR that the contractor may be spending more than is reasonably necessary on certain parts of the work, the COR should call for

additional explanation or documentation of those costs. If the additional information fails to satisfy the COR, the COR should discuss the matter with the contractor to determine if there is a more efficient way of getting the work done. In performing this function, the COR should remember that managing the contract work is basically the contractor's job. The COR should take the approach of questioning what the contractor is doing. The COR should not attempt to take over the contractor's job of management.

EXERCISING THE RIGHT TO DISALLOW COSTS

While the contractor is entitled to exercise judgment in managing the contract work, the Contracting Officer has the right to "disallow" and not reimburse contractor costs that are unreasonable in nature or amount.

This right is a powerful means of persuading a contractor to manage efficiently. The more the contractor realizes that the COR is keeping a close watch on costs and is ready to raise questions, the greater the incentive for economical management.

In labor-hour contracts, the costs per hour of work by categories of personnel have already been agreed to. Yet, even though the Government is obliged, generally speaking, to pay for all hours applied in good faith to the contract work, the COR may still question the contractor in instances where it appears that the contractor may be using an excessive number of hours or an unnecessarily expensive category of labor. Where the selection of the contractor is based in part on the excellence of the contractor's management capabilities, this consideration may help the COR persuade the contractor to avoid waste of labor hours.

MONITORING COST-REIMBURSEMENT CONTRACTS

Limitation Clauses

Note: Department of State policy does not permit Contracting Officers to award cost-reimbursement contracts at overseas posts. However, the "local guard" contracts are Time and Material type contracts.

All cost-reimbursement contracts contain a Limitation of Cost clause. Because completion of the contract work may turn out to cost more than the estimated cost, the Limitation of Cost clause provides, in effect, that the contractor will have no obligation to continue the work when the performance cost reaches the total estimated cost.

It makes no difference if the contract work is unfinished when this point is reached; the contractor is entitled to stop work unless and until the contract is

modified to increase the total estimated cost. Only the Contracting Officer can execute this modification. This additional funding is referred to as a “cost overrun.”

The Limitation of Cost clause reflects the requirements of Anti-Deficiency Act. This act prohibits Government agencies from making payments for a particular purpose of an amount greater than has been obligated by the Government for that purpose.

The clause expressly limits the Government’s obligation to the amount stated in the contract as the total estimated cost of the contract work.

Monitoring Status of Contract Funds

The following points stress the importance of keeping track of—and keeping the requirements office advised of—the contractor’s performance cost in relation to the total estimated cost.

- Once the total estimated cost is reached, the Government cannot extend the contractor’s obligation to perform unless and until the requirements office can provide additional funds. At best, obtaining additional funds may take considerable time. It may prove impossible.
- If the Limitation of Cost clause has relieved the contractor of the obligation to proceed, it is unfair to allow the contractor to continue at its own risk. Further, the contractor cannot be expected to maintain an indefinite state of readiness to resume performance.
- The longer the situation continues, the greater the risk that the contractor’s staff will have to be dispersed and the greater the costs of resuming contract work.
- Gaps in performance create pressures on the requirements office. These pressures impede orderly and thorough exploration of alternatives and encourage emergency-basis, rather than methodical, decision making. The requirements office will have to deal with such questions as—
 - Whether to seek funds to continue the contract effort, or, alternatively, whether to terminate the contract; and
 - What other project(s) should be canceled or curtailed to provide additional funds for continuation of the contract work.

The more accurate the information the COR can give the contracting and requirements office about the contractor’s incurred costs, the more likely that

sound decisions can be made about whether to continue, redirect, or terminate contractual effort. If additional funds are needed, early knowledge will enable the requirements office to minimize the effect on other projects and avoid a gap in the contractor's performance.

Monitoring Tools

The Limitation of Cost clause requires the contractor to notify the Contracting Officer, and provide a revised estimate of the total cost of the contract, whenever the contractor has reason to believe—

- That the costs it expects to incur in the next 60 days plus costs already incurred will exceed 75 percent of the total estimated cost stated in the contract; or
- That the total cost of performance (not including any fee) will exceed or be substantially less than the estimated cost stated in the contract.

These requirements are designed to avoid crises, but they do not provide a continuing picture of the status of contract funds. The following techniques may be used for that purpose.

- In all cases, the COR will see the vouchers submitted by the contractor for obtaining reimbursement. From the vouchers, the COR can maintain a running total of costs incurred and billed.
- Many contracts will require the contractor to submit periodic, interim financial reports. To be of the greatest use, such reports should address various aspects and phases of the budget for the entire contract task.

Then, based on the report, actually incurred costs can be compared with planned costs, shortfalls in estimates can be identified and timely management decisions regarding additional funding can be made and implemented.

Overruns

When the contractor's performance costs exceed the total estimated costs and the obligation to proceed is suspended, it is important that CORs and other requirements office personnel refrain from requesting or encouraging the contractor to continue work.

The Boards of Contract Appeals and Claims Courts have repeatedly held that such action may legally obligate the Government to reimburse the contractor for continuing the work. Furthermore, such action constitutes improper

obligation of appropriated funds. The end result may be that the COR is personally responsible for the over-obligation, as well as being subject to either criminal or administrative sanctions.

On the other hand, fairness requires that the Government not keep the contractor dangling. The COR should help to determine promptly which way the Government will move. If the decision is not to provide additional funds, the Contracting Officer should see that the contractor is promptly informed. No additional fee may be paid because of a cost overrun. The fee changes only when the work required changes, not when the estimated costs do.

When a contractor has reached or has made notification that it will be reaching the total estimated cost under the contract prior to completion of the work, the Government, upon the recommendation of the COR, has the following choices of actions it may take:

- The contract may be modified by the Contracting Officer to add additional funds; however, no additional fee may be added;
- The Contracting Officer may modify the contract to reduce the Statement of Work so as to enable completion with remaining funds;
- A decision may be made to let the contractor perform up to the extent of cost funds in the contract. After contract expiration the Government may either complete the work effort itself or re-contract; or
- The existing contract may be terminated for convenience.

What choice the COR and Contracting Officer exercise is dependent upon such factors as available funds, importance of the project, performance of the contractor, availability of in-house resources to complete the work, and urgency of the project.

MONITORING LABOR-HOUR CONTRACTS

Considerations similar to those for cost-reimbursement contracts apply to either time-and-materials or labor-hour contracts for services. Such contracts typically include a provision that sets the agreed hourly rate of compensation for each category of worker, as well as the maximum and minimum number of hours that personnel in each category are to work.

Normally, the stated maximum number of hours and increasing the contractor's obligation affects the scope of the contract and requires the contractor's agreement. (The necessity for agreement is in contrast to the Contracting Officer's power to unilaterally revise the contractor's obligation,

under the Limitation of Cost clause in cost-reimbursement contracts, by notifying the contractor that the estimated cost has been increased.)

In order to avoid issuing orders that would require work hours exceeding the stated maximum, the COR should keep a running check on total hours in each category, both expended and estimated. The totals should be compared with the maximum for the category.

This procedure is critical: if the available hours are found to be exhausted when a project is still in progress, the Government might have a problem in realizing any value from the project. Getting additional funds and processing contractual authorization for the contractor to continue will present difficulties.

UNIT 5 REVIEW EXERCISE #4

Answer the following questions. Then, check your answers against the ones in the [Answers](#) section.

1. The Government is obliged to pay for all hours applied in good faith to a labor-hours type contract, in general.

True

False

2. All cost-reimbursement contracts contain a _____ clause. The clause expressly limits the Government's obligation to the _____ as the total estimated cost of the contract work.

Select the words to fill in the blanks from the following list:

- a. LIMITATION OF COST b. TIME AND MATERIALS
c. CHANGES d. AMOUNT STATED IN THE CONTRACT

3. The COR should keep careful records of hours expended under labor-hours contracts.

True

False

4. From the _____, the COR can maintain a total of costs incurred and billed. (Fill in the blank.)

Select the words to fill in the blank from the following list:

- a. LIMITATION OF COST b. VOUCHERS
c. PROGRESS REPORT d. TIME AND MATERIALS

5. If the COR encourages the contractor to continue work under a labor-hour contract even though all funds have been expended, courts have held the Government liable.

True

False

UNIT 5 EXERCISE #4 ANSWERS

1. **TRUE.** Explanation: The Government is obliged to pay for all hours applied in good faith to a labor-hours type contract, in general.
(See Page **5-25**)
2. All cost-reimbursement contracts contain a **LIMITATION OF COST** clause. The clause expressly limits the Government's obligation to the **AMOUNT STATED IN THE CONTRACT** as the total estimated cost of the contract work.
(See Page **5-25**)
3. **TRUE.** Explanation: The COR should keep careful records of total hours expended and estimated under labor-hours contracts.
(See Page **5-28**)
4. From the **VOUCHERS**, the COR can maintain a total of costs incurred and billed.
(See Page **5-27**)
5. **TRUE.** Explanation: If the COR encourages the contractor to continue work under a labor-hour contract even though all funds have been expended, courts have held the Government liable.
(See Page **5-27**)

PAYMENTS

The principal obligation of the Government under a contract of any type is to pay the contractor for supplies delivered or work performed. Under a fixed-price contract, the exact amount to be paid has been stated in the contract. Under cost-reimbursement contracts the basic obligation is to pay the contractor the costs incurred in performing the contract work, plus a fee in some cases. The precise obligations of the Government regarding payment are spelled out in contract clauses set forth in the contract.

PAYMENTS CLAUSES

The Government's obligation to make payment under **fixed-price contracts** is expressed in the standard [Payments clause](#) required by the FAR. That clause provides for payment of the prices stated in the contract for supplies delivered and accepted, or for services rendered and accepted, upon submission of proper invoices. The clause also provides for payment for accepted partial deliveries when the amount would equal or exceed \$ 1,000 or 50 percent of the contract price.

The primary clause for **cost-reimbursement** types of contracts is the [Allowable Cost and Payment](#) clause. That clause provides that the Government will pay the contractor the cost of performance determined by the Contracting Officer to be allocable, allowable, and reasonable in accordance with Part 31 of the FAR and the terms of the contract.

Payment under fixed-price types of contracts is substantially simpler than under cost-reimbursement types. While there are more sophisticated payment provisions in both categories, payment for cost-reimbursement contracts is always more complex than for fixed-price contracts of any variation. To pay under a fixed-price type of contract, the Government representatives need only know that the contractor has properly provided the goods or services required. Under cost-reimbursement contracts more information is needed.

DETERMINING ALLOWABLE COSTS UNDER COST-REIMBURSEMENT CONTRACTS

To determine whether costs the contractor claims for reimbursement are allowable, the principles set forth in [Part 31 of the FAR](#) must be applied.

Costs excluded or limited by provisions in Part 31 or by provisions in the contract are not allowable. Of the costs that are not so excluded, the Government will pay costs incurred by the contractor only if they are *reasonable* and *allocable*. (See [Exhibit 5-2](#).)

REASONABLE COSTS

Reasonable costs are those of an amount and type that would be incurred ordinarily by a prudent person in a competitive business. Costs must be generally recognized as necessary for operation of the organization. They must be incurred in accordance with sound business practices and they must be consistent with the normal practices of the contractor.

ALLOCABLE COSTS

A cost is allocable if it can be assigned or charged to one or more cost objectives according to the relative benefits received or other equitable relationship.

Costs that are allocable to a Government contract include:

- Direct costs: expenses incurred specifically for the contract. Examples are (1) salaries of personnel performing a specific portion of the contract work; (2) cost of materials or supplies used for the contract; (3) costs of subcontracts entered into solely for performance of the contract.
- Certain indirect costs. Indirect costs are costs not directly attributable to the performance of the particular contract. Usually expressed as a percentage. Allocable indirect costs are:
 - Indirect costs that benefit both the contract and other work of the contractor, and that can be distributed between the contract and the other work based on relative benefit or another equitable basis.

Examples are: (1) depreciation on buildings and equipment used partially for the contract and partially for other work; (2) fringe benefits for employees charged directly to the contract; (3) supervisory salaries, if time is not charged directly to the contract.

- Indirect costs that are necessary to the overall operation of the business, although a direct relationship to any particular cost objective cannot be shown.

Examples are (1) office supplies; (2) bid and proposal costs; (3) salary of an accountant.

ACCOUNTING PRINCIPLES FOR DETERMINING ALLOCABILITY

Costs the contractor claims for reimbursement must be compiled in accordance with generally accepted accounting principles and practices or, if applicable, with the accounting standards established by [the Cost Accounting Standards Board](#). Public Law 91-379 requires certain national defense contractors and their subcontractors to comply with these standards, to disclose in writing and consistently follow their cost accounting practices.

Costs may be found to be in accordance with generally accepted accounting principles even though the contractor uses an accounting system different from that of other contractors. If the contract is over specified thresholds, the Cost Accounting Standards Board may require uniformity of accounting treatment in some aspects. When there is any question about the contractor's accounting system, personnel with expertise in accounting will usually have to make a determination.

EXHIBIT 5-2: ALLOWABLE—REASONABLE AND ALLOCABLE

Contractor's Costs					
Excluded by provisions in FAR Part 31 or by provisions in the contract	Not excluded by provisions in Part 31 or by provisions in the contract				
	Not reasonable	Reasonable: costs that would be incurred ordinarily by a prudent person in a competitive business			
		Not Allocable	Allocable		
			Direct costs	Indirect costs that can be distributed among all the contractor's work projects	Indirect costs that cannot be distributed to projects but are necessary to the overall operation of the contractor

COSTS SPECIFICALLY LIMITED OR EXCLUDED

Certain costs are specifically limited or excluded by [FAR Part 31](#). For example—

- Entertainment costs are not allowable.
- Interest expenses are not allowable.
- Advertising expenses are limited to certain purposes.
- Depreciation on Government-owned property is not allowable.

Costs may also be limited or excluded by provision in the contract. The Contracting Officer cannot agree in the contract to allow a cost that is specifically disallowed by the FAR. He or she can, however, agree with the contractor to limit or exclude costs allowable under the FAR.

PROCESSING PAYMENTS

Processing of payments begins with submission of invoices or vouchers by the contractor, with documentation supporting the costs claimed.

The Contracting Officer and the COR should review the invoices or vouchers to determine whether costs are proper and thus should be paid. The COR's or the program inspector's background and on-site knowledge of the contractor's progress will aid in evaluating the necessity, reasonableness, and allocability of costs. Where the contract provides for reimbursement of indirect costs at negotiated overhead rates, costs claimed as direct must be checked to see that they do not duplicate items covered by the overhead rate, such as fringe benefits and space rental.

The depth of the review depends on the circumstances. Payment of questionable items can be suspended pending resolution. Overpayments and underpayments can be adjusted when subsequent vouchers are paid.

The Contracting Officer forwards the voucher to the appropriate accounting center for certification for payment, noting the amount he or she provisionally approves.

The Contracting Officer also notes any amounts he or she suspended or disapproved as not allowable, allocable or reasonable to performance of the contract, or not allowable under the terms of the contract. The reasons for suspensions or disallowances should be stated.

In most cases, prior to final payment, there is a detailed audit of the costs claimed and allowed. The Contracting Officer should seek clarification and justification of any cost items questioned by Government auditors. Where agreement cannot be reached, the Contracting Officer should make a final decision under the Disputes clause to resolve the matter.

In accepting payment, the contractor agrees to release any claims against the Government.

PAYING A FIXED FEE

Payment of a fixed fee under a cost-reimbursement plus fixed-fee contract is governed by whatever provision is made in the contract schedule. After payment of 85 percent of the fee, the Contracting Officer is authorized to withhold, until contract completion and final payment, the remaining 15 percent of the fee or \$ 100,000, whichever is less.

PROMPT PAYMENT ACT

The [Prompt Payment Act \(PL 97-177\)](#) requires Federal agencies to pay their bills on time, to pay interest penalties when payments are late, and to take discounts only when payments are made within the discount period.

Contracting Officers must include appropriate payment provision clauses in each contract subject to the Act and participate in the processing of invoices in a timely manner so that payment may be made as close as possible to, but not later than, the due date or discount date as appropriate.

Payment will be based on receipt of proper invoices and satisfactory performance of contract terms. Fiscal offices will take discounts only when payments are made within the discount period. Interest penalties will be paid if payment is not timely or if discounts are taken after the expiration of the discount period. Interest penalties will be paid without the need for business concerns requesting them. Interest penalty payments will be absorbed within funds available for the administration or operation of the program for which the penalty was incurred. It should be noted that all Government personnel have a responsibility to process invoices/vouchers for payment in a timely fashion.

Timely processing is considered to be no more than seven calendar days from receipt. Undue delay can cause financial hardship for the contractor and can turn a good contractual relationship into an impossible situation. CORs must keep in mind that under the provisions of the Prompt Payment Act (97-177)

late payment of an invoice will cause the Government to pay interest to the contractor. The interest cost will be assessed against the program.

UNIT 5 REVIEW EXERCISE #5

Answer the following questions. Then, check your answers against the ones in the [Answers](#) section.

From Column II, select the word or phrase that correctly completes the sentences in Column I.

Column I	Column II
1. The principal obligation of the Government under a contract of any type is to _____.	a. 6 FAH-2 H-141
2. The standard _____ clause is required by the FAR for fixed-price contracts.	b. Allocable
3. The primary clause for cost-reimbursement types of contracts is the _____ clause.	c. Allowable
4. To determine whether costs the contractor claims for reimbursement are allowable, the principles set forth in _____ must be applied.	d. Allowable Cost and Payment
5. _____ costs are those of an amount and type that would be incurred by a prudent business person in a competitive business.	e. Contracting Officer
6. _____ costs are those that can be assigned or charged to one or more cost objectives according to the relative benefits received or other equitable relationship.	f. Contracting Officer and the COR
7. Entertainment costs are _____.	g. COR
8. The _____ should review invoices and vouchers.	h. Limited or excluded by provision in the contract
9. If bills are not paid on time, the Government must _____.	i. Not allowable
	j. Not reasonable
	k. Part 2 of the FAR
	l. Part 31 of the FAR
	m. Pay interest
	n. Pay the contractor
	o. Payments
	p. Prompt Payment Act
	q. Reasonable
	r. Certificate of Independent Price Determination
	s. Head of the Contracting Agency

UNIT 5 EXERCISE #5 ANSWERS

1. The principal obligation of the Government under a contract of any type is to **PAY THE CONTRACTOR.**
(See Page 5-32)
2. The standard **PAYMENTS** clause is required by the FAR for fixed-price contracts.
(See Page 5-32)
3. The primary clause for cost-reimbursement types of contracts is the **ALLOWABLE COST AND PAYMENT** clause.
(See Page 5-32)
4. To determine whether costs the contractor claims for reimbursement are allowable, the principles set forth in **PART 31 OF THE FAR** must be applied.
(See Page 5-32)
5. **REASONABLE** costs are those of an amount and type that would be incurred by a prudent business person in a competitive business.
(See Page 5-33)
6. **ALLOCABLE** costs are those that can be assigned or charged to one or more cost objectives according to the relative benefits received or other equitable relationship.
(See Page 5-33)
7. Entertainment costs are **NOT ALLOWABLE.**
(See Page 5-35)
8. The **CONTRACTING OFFICER AND THE COR** should review invoices and vouchers.
(See Page 5-35)
9. If bills are not paid on time, the Government must **PAY INTEREST.**
(See Page 5-36)

COMMUNICATING WITH CONTRACTORS

In all but the simplest contracts, some form of communication between the contractor and the Government during contract performance is to be expected, if not encouraged. In the more complex contracts, particularly those in which a COR has been designated, communications between the COR and the contractor is often virtually continuous. This interchange between the Government and the contractor can be a source of many problems if it is not handled properly or if the parties do not understand their roles.

ROLES OF THE COR AND THE CONTRACTING OFFICER

The COR is authorized to perform only those functions specifically delegated to him/her by the Contracting Officer. These functions are usually related to contract administration matters and generally authorize the COR to monitor the contractor's technical, schedule, and cost performance against the contract requirements. In *no* case is the COR authorized to change (add, delete, or modify) any of the contract terms, conditions, or requirements or to take any action that might appear to effect change. The Contracting Officer alone has the authority to make changes, and changes must be made in the form of a written contract modification.

AVOIDING UNAUTHORIZED CHANGES

Even if a COR is fully aware of the limits of his/her authority, it requires constant vigilance and thought to avoid unauthorized changes. In some cases, the COR and contractor interact frequently, perhaps several times a day, and often these interactions are informal discussions rather than official meetings. The COR must be aware that anything said to the contractor, however innocent or unimportant it may seem, could possibly be interpreted as a change to the contract. Most contractor personnel are aware that only the Contracting Officer can approve a change to the contract. However, most also feel that the COR is the true customer, the person whom they must satisfy to successfully complete the contract. Accordingly, many contractors are usually responsive to the perceived desires of the COR and sensitive to anything and everything that he/she says or implies. Sometimes claims for additional costs or schedule changes arise because of something the COR allegedly told the contractor to do.

See section [H-522.5](#) of the *COR Handbook* for information on “technical direction” and how it should be properly accomplished.

HANDLING UNSATISFACTORY PERFORMANCE

When a contractor's performance is delayed or inadequate or both, the contractor is said to be delinquent or in default. CORs must understand the rights and responsibilities of both the Government and the contractor in this case.

The Government's actions will be directed toward—

- Correcting the unsatisfactory performance, and
- Protecting the Government's interest in the event of the contractor's default.

The COR should notify the Contracting Officer as soon as he or she realizes that the contractor may become, or is in fact, delinquent. That way, the Contracting Officer will be prepared to take formal action, depending on the facts. If the Government takes no action, the contractor could interpret its silence to mean the Government doesn't expect performance required by the contract. This could adversely affect the Government's right to withhold payments, terminate for default, or otherwise exercise certain rights under the contract.

Two principles govern conduct in these situations:

- First, when a delinquency appears imminent, prompt action must be taken to protect the Government's rights; and
- Second, in administering a delinquent contract, Government personnel should do nothing that might waive the Government's rights.

INITIATING CORRECTIVE ACTION

The COR must take appropriate action to enforce any contract requirements that are not being met. The following are steps the COR should take if the contractor is not complying with a specific requirement called for in the contract.

- (1) The COR should call the contractor's attention to the discrepancy and seek the contractor's voluntary commitment to remedy the failure, and follow up later to see if remedial action was taken.
- (2) If the contractor disagrees that contract requirements are not being met, the COR should discuss the matter with the contractor to determine the basis for the contractor's position and also discuss the matter with the

Contracting Officer to see what course of action should be taken to resolve whether or not the contractor is complying with the contract.

- (3) If it is clear that the contractor's position has no reasonable basis, the COR should specifically direct the contractor to do whatever is necessary to meet the requirements of the contract. Such directions, if oral, are confirmed in writing, with a copy provided to the Contracting Officer. Giving such written directions is part of the COR's primary responsibility to see that the contractor does what he or she promised to do in the contract. (By the same token, the COR must not direct the contractor to do anything more than or different from what's in the contract. Such a direction would violate the limitation placed on the COR's authority.)
- (4) If, however, the contractor fails to comply with a contract requirement within a reasonable time after having been directed to do so, then the COR may recommend that the Contracting Officer send a letter pointing out the failure of performance and its importance to the Government, and directing that the deficiency be "cured" within a specified time period—usually ten days. This letter is called a "cure notice". Such a letter can be helpful because it assures that top management in the contractor's organization is aware of the problem and in enlists their support for corrective action.
- (5) If the departure from contract requirements continues, and if it appears that the contractor will not remedy his or her failure to do what the contract requires, then the COR should consider recommending that the Contracting Officer terminate the contract for default.

DEALING WITH DELINQUENCIES

A delinquency occurs when a contractor fails to deliver products or make progress in accordance with the schedule set forth in the contract. When an actual or threatened delinquency occurs, the COR must—

- (1) Promptly notify the Contracting Officer;
- (2) Determine the reason for the delay, and discuss it with the Contracting Officer. Based on the facts, the Contracting Officer will decide if the delay is excusable, and will determine an appropriate course of action;
- (3) If it is decided that the delay is excusable, the COR should request that the Contracting Officer issue a modification to change the contract period of performance/delivery schedule;

- (4) If the delay is not excusable, is attributable to the contractor, and there is no other recourse, the COR may request the Contracting Officer to terminate the contract for default.

DEALING WITH A COST OVERRUN

In a cost-reimbursement contract, a cost overrun occurs when a contractor exceeds the estimated costs or the fund limitation without proper authorization from the Contracting Officer. Cost overruns occur only in cost-reimbursement type contracts, since in fixed-price type contracts, the contractor is responsible for completion of the contract regardless of costs incurred.

When the COR becomes aware of an overrun situation, he or she should—

- (1) Not request or encourage the contractor to continue work. Boards of Contract Appeals have held that such action will legally obligate the Government to reimburse the contractor for keeping on with the work, notwithstanding the “Limitation of Cost” clause limiting the Government’s obligation to the stated estimated amount. This constitutes an improper obligation of appropriated funds, i.e., an unauthorized commitment.
- (2) Promptly notify the Contracting Officer and the requirements office.
- (3) Decide with the Contracting Officer and the requirements office on one of the following actions:
 - Terminate the contract for the convenience of the Government before the overrun occurs;
 - Modify the contract to decrease the technical effort in order to eliminate the need for additional funding; or,
 - Increase the contract funding to permit completion of the work.
- (4) If it is determined to complete the work and if additional funding is available, the COR must initiate the Procurement Request Package and submit it to the Contracting Officer for action.

REMEDIES AVAILABLE TO THE GOVERNMENT

WITHHOLDING PAYMENTS

All Government contracts contain a clause allowing the Government to withhold payments. When the Contracting Officer determines to withhold

contract payments, he or she will notify the contractor in writing that payments have been suspended until the deficiency or failure is cured.

TERMINATIONS

Situations may arise when the work contracted for does not run to completion. Two standard contract clauses are designed to cover this eventuality: the “Termination for Convenience of the Government” clause and the “Default” clause. No matter which type of termination is issued, or the extent of the terminated portion of the work, the decision to terminate is a unilateral right of the Government.

Both types of terminations can be either partial or complete; that is, all or any part of the work can be subject to the termination. The contractor must complete the portion that is not terminated. The contractor has no contractual right not to continue with the remaining work.

UNIT 5 REVIEW EXERCISE #6

Answer the following questions. Then, check your answers against the ones in the [Answers](#) section.

1. When communications between the COR and the contractor are frequent and cordial, there is no need to be concerned about unauthorized changes.

TrueFalse
2. When the contractor's performance is unsatisfactory, the Government's actions are directed toward (select 2)
 - a. Correcting unsatisfactory performance.
 - b. Notifying the contractor in writing that payments have been suspended until the deficiency or failure is cured.
 - c. Protecting the Government's interests in the event of the contractor's default.
 - d. Determining the reason for the unsatisfactory performance.
3. Cost overruns occur only in cost-reimbursement type contracts, since in fixed-price type contracts, the contractor is responsible for completion of the contract regardless of costs incurred.

TrueFalse

UNIT 5 EXERCISE #6 ANSWERS

1. **FALSE**. Explanation: Constant vigilance and thought is needed to avoid unauthorized changes (perhaps *especially* when communications between the COR and the contractor are frequent and cordial).

(See Page **5-40**)

2. When the contractor's performance is unsatisfactory, the Government's actions are directed toward—

CORRECTING UNSATISFACTORY PERFORMANCE;

and

PROTECTING THE GOVERNMENT'S INTERESTS IN THE EVENT OF THE CONTRACTOR'S DEFAULT.

(See Page **5-41**)

3. **TRUE**. Explanation: Cost overruns occur only in cost-reimbursement type contracts, since in fixed-price type contracts, the contractor is responsible for completion of the contract regardless of costs incurred.

(See Page **5-43**)

UNIT 5 SUMMARY

The goal of contract administration is to ensure that the contract is performed as *written by both the contractor and the Government*.

The COR plays an important role in contract administration. He or she functions as the technical representative of the Contracting Officer and stays in close communication, relaying any information affecting contractual commitments and requirements.

The COR must set up and maintain a file system to provide easy access to technical contract information and work progress; and to ease the transition to a new COR if one is appointed during the life of a contract. The contents of the file are listed on page 5-4.

The purpose of post-award orientation is to—

- Ensure the contractor understands contract requirements;
- Delineate the roles of Government personnel; and
- Explain the procedures that will be followed in administering the contract.

The types of orientation activities the Contracting Officer might choose are Letters and Conferences. The Contracting Officer may ask the COR to assist with responsibilities connected with these orientation activities.

The Government has the right to inspect what is delivered or performed by the contractor and either accept or reject it as being what was required by the contract.

When the Government purchases supplies or services, the requirements or quality assurance office is responsible for determining the level of contract quality requirements necessary to ensure a satisfactory quality program.

Under a cost-reimbursement contract, the COR needs to monitor and guide the contractor's efforts in order to prevent waste of public funds and get the services needed within the amount budgeted by the requirements office.

The Government relies primarily on the COR to track and guide the contractor's activities so as to conserve funds. Techniques available to the COR for performing this aspect of contract administration are—

- Reviewing Contractor Billings
- Exercising the Right to Disallow Costs
- Limitation Clauses
- Monitoring Status of Contract Funds

To provide a continuing picture of the status of contract funds, the following tools are used:

- The COR review all vouchers submitted by the contractor for obtaining reimbursement.
- Many contracts will require the contractor to submit periodic, interim financial reports.

When the contractor's performance costs exceed the total estimated costs, it is referred to as a cost overrun. It is important that CORs and other requirements office personnel refrain from requesting or encouraging the contractor to continue work in such cases.

The principal obligation of the Government under a contract of any type is to pay the contractor for supplies delivered or work performed.

Under cost reimbursement contracts, the Government will pay costs incurred by the contractor only if they are *reasonable* and *allocable*. Reasonable costs are those of an amount and type that would be incurred ordinarily by a prudent person in a competitive business. A cost is allocable if it can be assigned or charged to one or more cost objectives according to the relative benefits received or other equitable relationship.

Processing of payments begins with submission of invoices or vouchers by the contractor, with documentation supporting the costs claimed.

The Contracting Officer and the COR should review the invoices or vouchers to determine whether costs are proper and thus should be paid.

The [Prompt Payment Act \(PL 97-177\)](#) requires Federal agencies to pay their bills on time, to pay interest penalties when payments are late, and to take discounts only when payments are made within the discount period.

The Contracting Officer alone has the authority to make changes, and changes must be made in the form of a written contract modification. It requires constant vigilance and thought to avoid unauthorized changes.

When a contractor's performance is delayed or inadequate or both, the contractor is said to be delinquent or in default. CORs must understand the rights and responsibilities of both the Government and the contractor in this case.

The Government's actions can be directed toward—

- Correcting the unsatisfactory performance, and
- Protecting the Government's interest in the event of the contractor's default.

Remedies Available to the Government include—

- Withholding Payments; and
- Terminations.

REMINDERS TO CORs

As a COR, you should remember the following points:

- **DO** establish and maintain a separate file for each contract for documents and correspondence that pertain to the contract.
- **DO NOT** neglect to document significant actions, conversations, and the like as they occur.
- **DO NOT** delay documentation. Accuracy is essential.

UNIT 6 — CONTRACT MODIFICATION & CHANGES

UNIT OBJECTIVES

AFTER READING THE MATERIAL IN THIS UNIT AND COMPLETING THE REVIEW EXERCISES, YOU WILL BE ABLE TO—

- Identify the definition of “contract modification”;
- List reasons why contracts may be modified; and
- Distinguish between unilateral and bilateral contract modification.

IMPORTANCE OF UNIT TO COR

During contract performances, either the Government or the contractor might need to make adjustments. As COR, you need to know about how to participate in adjusting the contract through “contract modification.”

CONTRACT MODIFICATION

[FAR Part 43.101](#) defines contract modification as “any written change in the terms of a contract.”

A contract modification may reflect an alteration in the—

- Work statement;
- Delivery;
- Contract period;
- Price;
- Quantity; or
- Any other contract provision.

A modification may be made either unilaterally or bilaterally.

REASONS FOR CONTRACT MODIFICATION

Contract modifications are essential in order to—

- Correct mistakes discovered after the award of the contract;
- Reflect changed requirements of the requisitioning activity;
- Incorporate improvements in design or production; or
- Incorporate changed contractual provisions.

In other words, if the Government could not alter the contract to meet changed conditions, taxpayer's money might be spent on unnecessary goods and services. Contract modification clauses give the Government legal authority to protect itself against changed conditions.

UNILATERAL MODIFICATION

As defined by [FAR Part 43.103\(b\)](#), a unilateral modification is a contract modification that is signed only by the Contracting Officer. A unilateral modification may be either an administrative change or a substantive change order authorized by the “Changes” clause. It may also be a change authorized by another clause (e.g., an exercise of a contract option), or a notice of contract termination.

BILATERAL MODIFICATION

As defined by [FAR Part 43.103\(a\)](#), a bilateral modification is “a contract modification that is signed by the contractor and the Contracting Officer.” A bilateral modification is also called a “supplemental agreement” and can concern any aspect of the contract.

To be valid, all of the elements of a contract must be present in a bilateral modification. In particular, there must be consideration from both parties.

Among other things, bilateral modifications are used to:

- Make fair adjustments that result from the issuance of a change order,
- Clarify letter contracts, and
- Incorporate other agreements of the contracting parties in modifying the terms of contracts.

Example: When the Contracting Officer decides that a change order is necessary, the Contracting Officer and the contractor may negotiate a fair adjustment as part of the change. Then the Contracting Officer can issue a bilateral modification to reflect the new price agreement. This fixes the rights of the parties and eliminates a potential dispute.

GENERAL SCOPE OF THE CONTRACT

The Government must determine, for *all* modifications, whether a modification is *within the general scope* of the contract. Adding additional work under an existing contract permits the Government to avoid the costs associated with issuing a new procurement. There are definite limits, however, on adding such additional work. Basically, changes can be made unless the nature of the requirement is altered. If the function of the end item or service is generally the same as originally solicited, the change falls within the scope of the contract.

Determining whether a proposed change is within scope can be subjective. The Supreme Court has said that the general scope of a contract is “what should be regarded as fairly and reasonably within the contemplation of the parties when the contract was agreed to.”

Changes that are not within the general scope must be treated as a new procurement. If they are solicited non-competitively, they must be justified as other than full and open competition. If the Contracting Officer obtains full and open competition or gets the required approvals on a justification for not obtaining it, there is no prohibition against issuing a modification that is outside the scope of the original contract. Changes outside the general scope that are made to a contract *without* going through the appropriate solicitation or approval process are referred to as “cardinal changes”.

Many factors should be considered to determine whether a change falls within the general scope of a contract. Among them are—

- The changes in the contract price,
- The purpose of the final product or service,
- The purpose of the contract,
- The competitive factors of the original solicitation, and
- The contractor’s capabilities to make the change.

UNIT 6 REVIEW EXERCISE #1

Answer the following questions. Then, check your answers against the ones in the [Answers](#) section.

1. Which of the following phrases means the same as “any written change in the terms of a contract”?
 - a. Change order
 - b. Termination clause
 - c. Contract modification
 - d. Change clause

2. A bilateral modification is a contract modification that can be signed by the contractor only.

TrueFalse

3. Which of the following are not reasons why contract modification clauses are essential to Government contracts?
 - a. Correct mistakes discovered after the award of the contract
 - b. Allow for rising prices due to inflation or other economic forces.
 - c. Reflect changed requirements of the requisitioning activity
 - d. Incorporate improvements in design or production
 - e. Incorporate changed contractual provisions

UNIT 6 EXERCISE #1 ANSWERS

1. Which of the following phrases means the same as “any written change in the terms of a contract”?
 - a. Change order
 - b. Termination clause
 - c. **CONTRACT MODIFICATION. FAR 43-101 DEFINES “CONTRACT MODIFICATION” AS “ANY WRITTEN CHANGE IN THE TERMS OF A CONTRACT.” (See Page 6-1.)**
 - d. Change clause

2. **FALSE** Explanation: A *bilateral* modification is a contract modification that is signed by the contractor and the Contracting Officer. (See Page 6-2.)

A *unilateral* modification is a contract modification that is signed only by the Contracting Officer. (See Page 6-2)

3. Contract modifications are essential to Government contracts in order to:
 - a. Correct mistakes discovered after the award of the contract;
 - c. Reflect changed requirements of the requisitioning activity;
 - d. Incorporate improvements in design or production, and
 - e. Incorporate changed contractual provisions.

BUT NOT B. ALLOW FOR RISING PRICES DUE TO INFLATION OR OTHER ECONOMIC FORCES.

(See Page 6-2.)

CONTRACT CHANGES CLAUSE

AFTER READING THE MATERIAL IN THIS UNIT AND COMPLETING THE REVIEW EXERCISES, YOU WILL BE ABLE TO—

- Identify the significance of each of the five main provisions of a Changes Clause in a fixed price service contract;
- Identify the definition of the phrase “general scope of the contract”;
- Identify the definition of the phrase “cardinal change”; and
- Identify a fact situation in which a cardinal change (in the scope of the contract) has occurred.

BACKGROUND

Here is an early example of how the Changes Clause came about. The case involved a Government contract for the construction of an ironclad gunboat in 1863.

This contract contained a clause that gave the Government “the privilege of making alterations and additions to the plans and specifications at any time during the progress of the work.”

Under this clause, the Supreme Court declared that the Government had the right to make alterations to the contract as anticipated by the agreement. (*Chouteau v. United States*, 95 U.S. 61 (1877).)

FIXED-PRICE SERVICE CONTRACTS

Depending upon the type of contract and the goods or services involved, there are different Changes Clauses. These clauses are similar but vary in their phrasing.

Let’s look at the type of Changes Clause you are most likely to encounter. That is the Changes Clause for a fixed-price service contract (as stated in [FAR 52.243-1 Alternate 1](#)).

MAIN PROVISIONS

The Changes Clause for fixed-price service contracts consists of five main provisions. It reads:

(a) The Contracting Officer may at any time, by written order, and without notice to the sureties, if any, make changes within the general scope of this contract in any one or more of the following:

- (1) Description of services to be performed.
- (2) Time of performance (i.e., hours of the day, days of the week, etc.).
- (3) Place of performance of the services.

(b) If any such change causes an increase or decrease in the cost of, or the time required for, performance of any part of the work under this contract, whether or not changed by the order, the Contracting Officer shall make an equitable adjustment in contract price, the delivery schedule, or both, and shall modify the contract.

(c) The contractor must assert its right to an adjustment under this clause within 30 days from the date of receipt of the written order. However, if the Contracting Officer decides that the facts justify it, the Contracting Officer may receive and act upon a proposal submitted before final payment of the contract.

(d) If the Contractor's proposal includes the cost of property made obsolete or excess by the change, the Contracting Officer shall have the right to prescribe the manner of the disposition of the property.

(e) Failure to agree to any adjustment shall be a dispute under the Disputes clause. However, nothing in this clause shall excuse the Contractor from proceeding with the contract as changed.

Now let's examine some of these provisions in greater detail.

FORMAL CHANGE ORDERS

Paragraph (a) of the Changes Clause reads:

(a) The Contracting Officer may at any time, by written order, and without notice to the sureties, if any, make changes within the general scope of this contract in any one or more of the following:

- (1) Description of services to be performed.*
- (2) Time of performance (i.e., hours of the day, days of the week, etc.).*
- (3) Place of performance of the services.*

CONTRACTING OFFICER RESPONSIBILITY

FAR 43.202 provides that change orders “shall be issued by the Contracting Officer except when authority is delegated to the administrative Contracting Officer” (ACO).

In short, only the Contracting Officer or ACO—and not the COR—may make formal change orders.

AT ANY TIME

The Changes Clause stipulates that changes may be ordered “at any time.” What does this phrase mean?

Example: Let’s assume that you are the COR monitoring a contract for a research study. The contractor produces a report and delivers it to your installation in compliance with the terms of the contract. The report is accepted as meeting the contractual standards.

However, on the day following delivery, you recognize that the report does not address one important area that was not recognized at the time the study was commissioned. Addressing the area would not require any new study or gathering new data. Rather, it would only require re-analyzing the data already gathered to make the report suitable for Government use.

As the COR, you may recommend to the Contracting Officer that a change is necessary. The Contracting Officer may then issue a formal change order that requires the contractor to make the specific changes necessary to make the report suitable for their intended purpose.

But, what if the contractor refuses?

The phrase “at any time” has generally been interpreted as any time *before termination of the contract*—either by:

- Operation of law,
- Operation of one of the termination clauses in the contract, or
- Performance by both parties.

Final payment by the Government is considered to be the Government’s performance under the contract. So, a formal change may be ordered after acceptance of the contractor’s performance but before the Government’s final payment. (*J. D. Hedin Construction Co. v. United States*. 171 Cl. Cl.70, 347 F.2d 235 (1965).)

Thus, the formal change order in the example above is valid. A contractor’s refusal to comply with it can be grounds for a default termination. The apparent unfairness of requiring additional work by the contractor after the contractor has completed performance is offset by the equitable adjustment (additional compensation or time) the contractor will receive for doing the additional work.

The Contracting Officer may not use the authority of the Changes Clause to reject goods that have been previously accepted. If the Contracting Officer does reject goods under the contract, the contractor does not receive a fair adjustment for the corrections the contractor makes.

The purpose of the “at any time” provision of the clause is to allow reworking of otherwise useless services. Without this provision, the Government would have to follow the more costly and time-consuming procedures involved in a new procurement to do the rework.

WRITTEN ORDER

The Changes Clause states that change orders must be “by written order.”

Standard Form 30 (SF 30), Amendment of Solicitation/Modification of Contract, shown in [Exhibit 6-1 \(page 6-27\)](#), is used for change orders issued under the Changes Clause. ([FAR 43-301 \(a\)\(1\)\(ii\).](#))

Example: Let’s assume that the requisitioning activity discovers the need for an immediate change. The Contracting Officer orally orders the change. He assures the contractor that a formal written order will follow. The contractor proceeds with the change, but the Contracting Officer forgets to follow up with a written change

order. The contractor completes the work on the contract as changed, and you—the COR—accept. Can the contractor force the Government to pay for the change since it was not in writing as required by the Changes Clause?

The Court of Claims has held that a change order does not have to be in writing so long as a change order is issued, the change was made, and the Government has benefited. To hold otherwise would impose an undue hardship on the contractor. (*Armstrong & Co. v. U.S.* 98 Ct. Cl. 519 (1943).)

All change orders should be written. But, if they are not, the contractor may still recover on an equitable (fair) basis.

SCOPE OF CONTRACT AND THE CHANGES CLAUSE

A change under the Changes Clause must be “...within the general scope of this contract.” This language is a general limitation upon the three specified areas that are subject to change orders—namely the:

- Description of services to be performed,
- Time of performance, and
- Place of performance of the services.

In other words, not only must the change involve one of the three specified areas, but it must also be within the general scope of the contract.

Cardinal Change Theory

The Court of Claims uses the phrase “cardinal change” to describe changes that are beyond the scope of the contract. The Court has said that a “cardinal change occurs when the Government effectively requires the contractor to perform duties materially different from those originally bargained for.” (*Allied Materials-Equipment Co., Inc. v. United States*, 469 F.2d 562, 215 Ct. Cl. 406, 20 G.C. 60 (1978).)

There are no definite rules for determining when a change is “cardinal.” Each case must be decided on its own particular facts. Contrast the following two examples:

The contract required the company to deliver 100 gas and 100 electric refrigerators. Before production of any gas refrigerators, there was a change order that called for the gas refrigerators to be changed to electric. The

company performed as ordered and filed a claim for an equitable price adjustment based on the cardinal change theory.

The Court of Claims denied the company's claim, saying that the volume of refrigerators was not increased, no new item unknown to the company was required, the company was geared for the production of the electric units and had not produced any gas driven units, and the two types of refrigerators were essentially the same except for the power units, which the company purchased fully assembled. (*KECO Industries, Inc. v. United States*. 364 F.2d 838 (1966).)

A supplemental agreement that changed portable heaters from gasoline to diesel was protested to the General Accounting Office (GAO) by the contractor. The supplemental agreement was held invalid because it required a substantial redesign of the heater, an alteration of performance characteristics, a price increase of 29 percent, and a doubling of the delivery time.

The Comptroller General specifically distinguished this case from the KECO case. The contractor was not geared up for the production of both types of heaters, and this change, unlike KECO, required substantial redesign of the heater. (*American Air Filter (AAF), Inc.* 78-1 CPD 136 (1978).)

Cardinal Change Theory Today

The cardinal change theory applies today in two rare situations:

- If a cardinal change is ordered, there is no duty of the contractor to follow it, and the contractor may stop performance. However, as a practical matter, most contractors will continue performance in accordance with the change because they will be compensated through an equitable adjustment or because of fear that the change order is valid and a default termination might be upheld.
- A supplemental agreement outside the scope of the contract is generally considered a new procurement. It must comply with the rules regarding contract competition. However, the contractor who already agrees is unlikely to complain. So, a third person must learn of the agreement and make a protest.

Breach of Contract

Out-of-scope changes, often referred to as “cardinal changes,” require the contractor to perform work that is materially different—either in substance or magnitude—from that agreed upon in the original contract. An out-of-scope change, if ordered by the Government, may be considered a breach of contract, and the contractor may be entitled to damages—including damages that could

be greater than those the contractor would be entitled to under an equitable adjustment. Out-of-scope changes should be met through the award of a new contract, unless the Contracting Officer can justify why normal competitive procedures cannot be followed.

Service, Time, and Place

The Changes Clause for fixed price service contracts permits changes only in the—

- Definition of services to be performed,
- Time of performance, and
- Place of performance.

The Changes Clause does not provide for some changes the Contracting Officer may consider necessary for effective contract administration. A change in quantity is one example.

Quantity may not be unilaterally changed under the Changes Clause. A decrease in quantity may be made by a partial termination for convenience. An increase in quantity is a new procurement and may be made by supplemental agreement only if the rules on contract competition are not violated.

EQUITABLE ADJUSTMENTS

Paragraph (b) of the Changes Clause reads:

(b) If any such change causes an increase or decrease in the cost of, or the time required for, performance of any part of the work under this contract, whether or not changed by the order, the Contracting Officer shall make an equitable adjustment in the contract price, the delivery schedule, or both, and shall modify the contract.

FLEXIBLE AND INEXPENSIVE METHOD

This equitable adjustment provision provides for flexibility. It enables the Government to order a change without the extra time and expense of awarding a new contract. It is a relatively inexpensive procedure. By guaranteeing the contractor a fair compensation, the Government can make changes within the scope of the original contract.

The equitable adjustment provision indicates what may be adjusted and how the adjustments may occur. Adjustments may be made in the contract price, delivery schedule, or both. These adjustments may be increases or decreases.

Costs related to matters not ordered changed are subject to an equitable adjustment.

BURDEN OF PROOF

The party trying to get an adjustment must prove they are entitled to a fair adjustment and set the amount. This holds whether the contractor or the Government wants the adjustment.

Determining the exact adjustment to be made poses many problems for the Government, the contractors, and the courts. There are two basic approaches used to make this determination: the total cost method and the jury verdict method.

TOTAL COST METHOD

The “total cost” method is based on the costs incurred by the contractor. This method measures the difference between the contractor’s original bid estimate and the actual total cost of performing the contract as changed.

The major problem with this method is determining the actual costs involved in the change. As a general rule, this method has been rejected due to this problem. This method will only be used when the data is exceptionally accurate, plentiful, and available.

JURY VERDICT METHOD

The “Jury verdict” or “reasonable cost” method involves determining the reasonable value or cost of the work performed. The “verdict” is usually an amount somewhere between the amounts claimed by each party.

PROPOSAL FOR ADJUSTMENT

Paragraph (c) of the Changes Clause reads:

(c) The contractor must assert its right to an adjustment under this clause within 30 days from the date of receipt of the written order. However, if the Contracting Officer decides that the facts justify it, the Contracting Officer may receive and act upon a proposal submitted before final payment of the contract.

CONTRACTING OFFICER'S RESPONSIBILITY

The Contracting Officer has the main responsibility for determining what adjustment should be made, if any. The contractor must submit the proposal for equitable adjustment to the Contracting Officer before the Contracting Officer can make such a determination.

30-DAY LIMIT

The contractor must assert the proposal for equitable adjustment within 30 days from the date of receipt of the notification of change. However, the Contracting Officer may receive and act on any request for adjustment made before any final payment under the contract. The Contracting Officer's discretion here is greatly limited. Refusing to consider a request for adjustment *only* because it is late is not considered reasonable.

The purpose of the 30-day rule is to protect against delays that are harmful to the Government. *If the Government is harmed or put at a disadvantage* by the contractor's failure to comply with the 30-day rule, *then* the 30-day rule bars the adjustment.

Example: A contractor fails to file a request for adjustment within the 30-day limit. This prevents the Contracting Officer from verifying the contractor's claim(s). The Government has been prejudiced, and it may use the 30-day rule to bar the adjustment.

CHANGES CLAUSE

Paragraph (e) of the Changes Clause reads as follows:

(e) Failure to agree to any adjustment shall be a dispute under the Disputes clause. However, nothing in this clause shall excuse the Contractor from proceeding with the contract as changed.

If the contractor and the Contracting Officer are unable to agree on an adjustment, then the disagreement is considered a dispute. In this case, the provisions of the Disputes Clause ([FAR 52.233-1](#)) apply.

This provision applies even if there is a dispute concerning a change. A refusal to continue performance subjects the contractor to a termination for default action ([FAR Subpart 49.4](#)).

But, as a general rule, this requirement does not apply to changes that are beyond the scope of the contract.

UNIT 6 REVIEW EXERCISE #2

Answer the following questions. Then, check your answers against the ones in the **Answers** section.

1. The COR may at any time, by written order, make changes within the general scope of the contract relating to the description of services to be performed, the time of performance, or the place of performance of the services.

TrueFalse
2. Only changes ordered by a written change order are subject to an equitable adjustment.

TrueFalse
3. Under no circumstances may a contractor submit a “proposal for adjustment” after 30 days from the date of receipt of a written change order.

TrueFalse
4. The refusal of the contractor to continue performance under the contract subjects the contractor to a (termination/continuation) for (convenience/default) action. (Choose the correct words.)
5. The phrase “general scope of the contract” is a general limitation upon the three specified areas that are subject to change orders.

TrueFalse
6. A “cardinal change” in a contract occurs when the Government effectively requires the contractor “to perform duties that are (measurably/materially) different from those originally bargained for.” (Choose the correct word.)

UNIT 6 EXERCISE #2 ANSWERS

1. **FALSE** Explanation: Only the Contracting Officer may at any time, by written order, and without notice to the sureties, if any, make changes **within the general scope of this contract** in any one or more of the following:
 - (1) Description of services to be performed,
 - (2) Time of performance (i.e., hours of the day, days of the week, etc.),
 - (3) Place of performance of the services.(See Page **6-8**.)

2. **FALSE** Explanation: The Court of Claims' decisions indicate that the change order need not be in writing so long as a change order was issued, the change was made, and the Government has benefited. To hold otherwise would have the-effect of imposing undue hardship on the contractor.

All change orders should be written, but if they are not, the contractor may still recover on an equitable basis.

(See Page **6-9**.)

3. **FALSE**. The contractor must make his claim within 30 days from the date of receipt of the notification of change. However, the Contracting Officer has the discretion to receive and act on any claim made prior to final payment under the contract. (See Page **6-14**.)

4. The refusal of the contractor to continue performance under the contract subjects the contractor to a **TERMINATION** for **DEFAULT** action. (See Page **6-14**.)

5. **TRUE**. Explanation: A change under the Changes Clause must be "...within the general scope of this contract." (See Page **6-10**.)

6. A "cardinal change" in a contract occurs when the Government effectively requires the contractor "to perform duties that are **MATERIALLY** different from those originally bargained for." (See Page **6-10**.)

CONSTRUCTIVE CHANGE

AFTER READING THE MATERIAL IN THIS UNIT AND COMPLETING THE REVIEW EXERCISES, YOU WILL BE ABLE TO—

- Distinguish between a formal change order and a constructive change,
- Identify a fact situation that illustrates the Constructive Change Doctrine.

CONSTRUCTIVE CHANGE ORDER

A “constructive change order” is defined as any conduct, words, or deeds by a Government official who is authorized to order changes that is not a formal change order, but that requires the contractor to perform work different from the work prescribed by the original terms of the contract.

A constructive change order consists of two elements: the **change** element and the **order** element.

CHANGE ELEMENT

The “change element” is present whenever the actual performance of the contractor goes beyond the minimum performance standards required by the terms of the contract.

ORDER ELEMENT

The “order element” is present whenever the Government orders the contractor to make a change.

By word or deed, the Government’s representative “must require the contractor to perform work which is not a necessary part of the contract. This is something which differs from advice, comments, suggestions, or opinions...” (*Industrial Research Associates, Inc.* DCAB WB-5, 68-1 BCA 7069 (1968) at 32,685-86.)

A constructive change can be in almost any form. The oral order is the classic example, but it may also be in writing. It can be an act or the failure to act. It can be a formal or an informal action. Almost any conduct can create this problem, which is also called a “change by implication.”

Inexperienced or uninformed contract administrators—including CORs—are most likely to make constructive changes. But keep in mind that almost anyone can constructively change a contract.

CONSTRUCTIVE CHANGE DOCTRINE

As a result of disagreements between contractors and the Government concerning alleged constructive changes, the Constructive Change Doctrine was adopted by the GSA Services Board of Contract Appeals (GSBCA). The Doctrine keeps the interests of both contracting parties in mind.

This Doctrine states that if, as a result of the Government’s conduct, a contractor must perform more work, different work, or work according to higher standards than the terms of the contract, then the contractor is entitled to an equitable adjustment.

BENEFITS TO GOVERNMENT & CONTRACTOR

The contractor benefits from the Constructive Change Doctrine. It allows the contractor to be compensated for work performed outside of the original terms of the contract. The Government also benefits from the Doctrine, but in a different way.

The GSBCA’s reasoning is that, since the work was ordered, performed, and accepted, then the work must have been necessary. If it was necessary work, then the Contracting Officer simply made a mistake in not issuing a formal change order. Therefore, the Constructive Change Doctrine represents a correction of what should have been done in the first place.

The best way to appreciate the Constructive Change Doctrine is to look at a series of examples. The following are among the most common examples of constructive changes.

INFORMAL REQUESTS

The following are examples of informal request constructive changes.

- The COR is an FSO-3 assigned to a dining facility contract. One day the Ambassador tours the facility and starts making demands of contractor personnel in matters different from the contract requirements. The COR

is present. The COR does nothing about the situation, such as bringing the contract provisions to the Ambassador's attention. If the contractor complies with the demands, a Constructive Change has been made.

- There is a contract for remodeling Government quarters. One of the quarters to be remodeled is the Ambassador's. After completion of the job, the Ambassador's spouse "rejects" the work and has the contractor replace the drapes with a different color. This is also a Constructive Change.

DEFECTIVE SPECIFICATIONS/STATEMENT OF WORK

Suppose the Government awards a firm, fixed-price contract for a new type of service. The performance statement of work sets out the materials to be used, and also establishes certain procedural requirements that must be satisfied. The contractor has difficulty performing the service as specified, and goes to a lot of additional expense attempting to conform. Finally it is determined that the performance statement of work is defective.

Several cases have held that, when Government specifications are issued, the Government implies that satisfactory conformance to those specifications is practical. If the specifications are found to be defective, and the contractor incurs additional expense in trying to conform to them, then a Constructive Change has been made.

AMBIGUOUS SPECIFICATIONS/STATEMENT OF WORK

Assume that the Contracting Officer interprets the language of the contract one way, while the contractor reasonably interprets the contract another way. This interpretation was the basis for the contractor's bid. If the contractor is required to conform to the Contracting Officer's interpretation at an increased cost, then the contractor may be entitled to a price adjustment under the Constructive Changes Doctrine.

STUDIES AND COST ESTIMATES

Suppose the Government has a contract to buy armored automobiles. It wants to know how much a change in the design of those automobiles will cost. If the Government asks the contractor to perform an informal feasibility study of the change or to estimate how much the cost might be, this amounts to a Constructive Change. This is especially true if the contractor does not get any extra business as a result of the study.

GEOGRAPHIC CHANGES

Consider a contract to collect garbage on a regular route of scheduled pick-ups. A radical change in the order of the pick-ups might be seen as extra work that requires more compensation.

EXCESSIVE OR ERRONEOUS INSPECTION

The following are examples of excessive or erroneous inspection.

- Assume a Government inspector rejected some finished service. The inspector orally ordered it to be reworked. The contractor performs the work at an increased cost. It is later determined that the original service did conform to the work statement, and the inspector was not authorized to issue change orders. The contractor may be entitled to an equitable adjustment under the Constructive Change Doctrine.
- Consider the situation in which the COR is replaced during performance of a contract. The first COR was very lenient and repeatedly accepted performance below the standards specified in the performance statement of work. However, the new COR inspects the work in strict accordance with the contract standards, and frequently rejects the contractor's performance. The contractor may claim excessive enforcement on the basis that the first COR's tolerance had established a precedent and had, therefore, lowered the contract performance standards.

DEFECTIVE GOVERNMENT-FURNISHED PROPERTY (GFP)

Defective Government-furnished property (GFP) can also constructively change a contract. For example, consider a custodial contract in which the Government provides cleanser for tile floors. The contractor uses the specified cleanser, but it is not adequate to do the job specified in the contract standards. The contractor has to work extra time to clean the tile floors—according to the contract requirements. The low quality of the GFP (cleanser) has probably led to a Constructive Change.

REFUSAL TO CLARIFY SPECIFICATIONS/STATEMENT OF WORK

Often a COR must provide technical clarification to a contractor. If the COR is unable or unwilling to do this, or the information is wrong, the contractor may incur more costs. The contractor may be due compensation for these costs.

ACCELERATION OF PERFORMANCE

Suppose that, under a firm, fixed-price service contract, contract performance is to begin on 1 January and end on 1 August. Due to an excusable delay, the contractor is unable to begin performance until 1 February. The Contracting Officer refuses to give the contractor the time extension that the contractor requests. In fact, the Contracting Officer demands delivery on the original 1 August date.

In order to complete the contract on time, the contractor is forced to increase the contractor's work force, pay additional overtime, and speed up performance of the subcontractors. All of this adds increased costs. This is known as acceleration of performance.

The contractor would be entitled to an additional compensation because the contractor was entitled to a time extension due to the excusable delay. (Keep in mind that the acceleration order by the Contracting Officer is improper only if the contractor's delay was excusable.)

CONSTRUCTIVE CHANGES

From this discussion, you may conclude that the contractor may be due compensation for *any* changed circumstance. This is not always the case. Obviously, a Constructive Change cannot occur if a change is made in accordance with the Changes Clause.

In addition, the following are not considered Constructive Changes:

- Suggestions,
- Changes made voluntarily by the contractor, and
- Proper exercise of option clauses.

DETERRENTS TO CONSTRUCTIVE CHANGES

Constructive Changes are one of the most severe problems encountered in administering contracts.

Many efforts have been made to avoid or prevent Constructive Changes. Basically, these efforts call for the contractor to take directions from only certain personnel.

These efforts have been somewhat helpful. But, regardless of the contractual provisions, if the prerequisites for a Constructive Change exist, then an equitable adjustment will be made.

UNIT 6 REVIEW EXERCISE #3

Answer the following questions. Then, check your answers against the ones in the [Answers](#) section.

1. A constructive change order must comply with the formal requirements of the Changes Clause.

TrueFalse
2. If a Contracting Officer issues an informal change order to a contractor to perform work that is outside of the original terms of the contract, then the contractor can rely on the Constructive Change Doctrine to recover additional compensation if the Government accepts and *benefits from* the work.

TrueFalse
3. A contract calls for the contractor to polish the embassy conference room floors every three months using a DOS furnished electric polisher. However, the DOS polisher is constantly in the shop for maintenance. The contractor rents a polisher from a private rental firm to fulfill the terms of the contract. Which of the following, constructive changes does this situation best describe?
 - a. Accelerated performance
 - b. Informal request
 - c. Defective GFP
 - d. Cost estimate

UNIT 6 EXERCISE #3 ANSWERS

1. **FALSE** Explanation: By definition, a “constructive change order” is defined as any conduct by a Government official authorized to order changes that is not a formal change order, but that has the effect of requiring the contractor to perform work different from that prescribed by the original terms of the contract. (See Page **6-17**.)
2. **TRUE**. If a Contracting Officer issues an informal change order to a contractor to perform work that is outside of the original terms of the contract, then the contractor can rely on the Constructive Change Doctrine to recover additional compensation if the Government accepts and benefits from the work. (See Page **6-18**)
3. A contract calls for the contractor to polish the embassy conference room floors every three months using a DOS furnished electric polisher. However, the DOS polisher is constantly in the shop for maintenance. The contractor rents a polisher from a private rental firm to fulfill the terms of the contract. Which of the following, constructive changes does this situation best describe?
 - a. Accelerated performance
 - b. Informal request
 - c. **DEFECTIVE GFP. (See Page **6-20**.)**
 - d. Cost estimate

UNIT 6 SUMMARY

CONTRACT MODIFICATION

The ability of the Government to modify its contracts is essential to:

- Meet changed conditions, and
- Avoid spending taxpayers' money on unneeded goods and services.

A contract modification is defined by the FAR as “any written change in the terms of a contract.”

CONTRACT CHANGES CLAUSE

Usually, a supplemental agreement is the preferred method of modifying a contract. Sometimes a change order in accordance with the Changes Clause is necessary.

The contract Changes Clause establishes the terms and conditions for issuing formal change orders.

A change order issued under the Changes Clause must fall within the “general scope” of the contract. The Contracting Officer may not be sure whether an ordered change falls within the “general scope” of the contract. If there is any doubt, the Contracting Officer should use a supplemental agreement to make the desired change.

CONSTRUCTIVE CHANGES

The Constructive Change Doctrine developed in order to fairly compensate the contractor where the Government has:

- By its conduct, required work different from that prescribed by the original terms of the contract, and
- Accepted and benefited from the work performed by the contractor.

Constructive changes, or “changes by implication,” need to be recognized as a danger and be avoided.

REMINDERS TO CORs

As a COR, you should remember the following points:

- **DO NOT** permit the contractor to proceed on work outside the scope of the contract. If you're uncertain whether the work is outside the scope of the contract, immediately contact the Contracting Officer for guidance.
- **DO NOT** make a contract change that is outside your authority. Only the Contracting Officer can make formal changes. A COR's authority to make changes is ordinarily very limited.

EXHIBIT 6-1: STANDARD FORM 30

AMENDMENT OF SOLICITATION/MODIFICATION OF CONTRACT				1. CONTRACT ID CODE		PAGE OF PAGES	
2. AMENDMENT/MODIFICATION NO.		3. EFFECTIVE DATE		4. REQUISITION/PURCHASE REQ. NO.		5. PROJECT NO. (If applicable)	
6. ISSUED BY		CODE		7. ADMINISTERED BY (If other than Item 6)		CODE	
8. NAME AND ADDRESS OF CONTRACTOR (No., Street, County, State and ZIP Code)				(<input checked="" type="checkbox"/>)		9A. AMENDMENT OF SOLICITATION NO.	
						9B. DATED (SEE ITEM 11)	
						10A. MODIFICATION OF CONTRACT/ORDER NO.	
						10B. DATED (SEE ITEM 13)	
CODE		FACILITY CODE					
11. THIS ITEM ONLY APPLIES TO AMENDMENTS OF SOLICITATIONS							
<input type="checkbox"/> The above numbered solicitation is amended as set forth in Item 14. The hour and date specified for receipt of Offers <input type="checkbox"/> is extended, <input type="checkbox"/> is not extended.							
Offers must acknowledge receipt of this amendment prior to the hour and date specified in the solicitation or as amended, by one of the following methods: (a) By completing Items 8 and 15, and returning _____ copies of the amendment; (b) By acknowledging receipt of this amendment on each copy of the offer submitted; or (c) By separate letter or telegram which includes a reference to the solicitation and amendment numbers. FAILURE OF YOUR ACKNOWLEDGMENT TO BE RECEIVED AT THE PLACE DESIGNATED FOR THE RECEIPT OF OFFERS PRIOR TO THE HOUR AND DATE SPECIFIED MAY RESULT IN REJECTION OF YOUR OFFER. If by virtue of this amendment you desire to change an offer already submitted, such change may be made by telegram or letter, provided each telegram or letter makes reference to the solicitation and this amendment, and is received prior to the opening hour and date specified.							
12. ACCOUNTING AND APPROPRIATION DATA (If required)							
13. THIS ITEM APPLIES ONLY TO MODIFICATIONS OF CONTRACTS/ORDERS, IT MODIFIES THE CONTRACT/ORDER NO. AS DESCRIBED IN ITEM 14.							
<input checked="" type="checkbox"/> A. THIS CHANGE ORDER IS ISSUED PURSUANT TO: (Specify authority) THE CHANGES SET FORTH IN ITEM 14 ARE MADE IN THE CONTRACT ORDER NO. IN ITEM 10A.							
<input type="checkbox"/> B. THE ABOVE NUMBERED CONTRACT/ORDER IS MODIFIED TO REFLECT THE ADMINISTRATIVE CHANGES (such as changes in paying office, appropriation date, etc.) SET FORTH IN ITEM 14, PURSUANT TO THE AUTHORITY OF FAR 43.103 (b).							
<input type="checkbox"/> C. THIS SUPPLEMENTAL AGREEMENT IS ENTERED INTO PURSUANT TO AUTHORITY OF:							
<input type="checkbox"/> D. OTHER (Specify type of modification and authority)							
E. IMPORTANT: Contractor <input type="checkbox"/> is not, <input type="checkbox"/> is required to sign this document and return _____ copies to the issuing office.							
14. DESCRIPTION OF AMENDMENT/MODIFICATION (Organized by UCF section headings, including solicitation/contract subject matter where feasible.)							
Except as provided herein, all terms and conditions of the document referenced in Item 9A or 10A, as heretofore changed, remains unchanged and in full force and effect.							
15A. NAME AND TITLE OF SIGNER (Type or print)				16A. NAME AND TITLE OF CONTRACTING OFFICER (Type or print)			
15B. CONTRACTOR/OFFEROR		15C. DATE SIGNED		16B. UNITED STATES OF AMERICA		16C. DATE SIGNED	
(Signature of person authorized to sign)				BY (Signature of Contracting Officer)			
NSN 7540-01-152-8070 PREVIOUS EDITION UNUSABLE				30-105		STANDARD FORM 30 (REV. 10-83) Prescribed by GSA FAR (48 CFR) 53.243	

SF30 (Back)

INSTRUCTIONS

Instructions for items other than those that are self-explanatory, are as follows:

(a) Item 1 (Contract ID Code). Insert the contract type identification code that appears in the title block of the contract being modified.

(b) Item 3 (Effective date).

(1) For a solicitation amendment, change order, or administrative change, the effective date shall be the issue date of the amendment, change order, or administrative change.

(2) For a supplemental agreement, the effective date shall be the date agreed to by the contracting parties.

(3) For a modification issued as an initial or confirming notice of termination for the convenience of the Government, the effective date and the modification number of the confirming notice shall be the same as the effective date and modification number of the initial notice.

(4) For a modification converting a termination for default to a termination for the convenience of the Government, the effective date shall be the same as the effective date of the termination for default.

(5) For a modification confirming the contracting officer's determination of the amount due in settlement of a contract termination, the effective date shall be the same as the effective date of the initial decision.

(c) Item 6 (Issued By). Insert the name and address of the issuing office. If applicable, insert the appropriate issuing office code in the code block.

(d) Item 8 (Name and Address of Contractor). For modifications to a contract or order, enter the contractor's name, address, and code as shown in the original contract or order, unless changed by this or a previous modification.

(e) Items 9, (Amendment of Solicitation No.--Dated), and 10, (Modification of Contract/Order No.--Dated). Check the appropriate box and in the corresponding blanks insert the number and date of the original solicitation, contract, or order.

(f) Item 12 (Accounting and Appropriation Data). When appropriate, indicate the impact of the modification on each affected accounting classification by inserting one of the following entries:

(1) Accounting classification
Net increase \$

(2) Accounting classification
Net decrease \$

NOTE: If there are changes to multiple accounting classifications that cannot be placed in block 12, insert an asterisk and the words "See continuation sheet".

(g) Item 13. Check the appropriate box to indicate the type of modification. Insert in the corresponding blank the authority under which the modification is issued. Check whether or not contractor must sign this document. (See FAR 43.103.)

(h) Item 14 (Description of Amendment/Modification).

(1) Organize amendments or modifications under the appropriate Uniform Contract Format (UCF) section headings from the applicable solicitation or contract. The UCF table of contents, however, shall not be set forth in this document.

(2) Indicate the impact of the modification on the overall total contract price by inserting one of the following entries:

(i) Total contract price increased by \$

(ii) Total contract price decreased by \$

(iii) Total contract price unchanged.

(3) State reason for modification.

(4) When removing, reinstating, or adding funds, identify the contract items and accounting classifications.

(5) When the SF 30 is used to reflect a determination by the contracting officer of the amount due in settlement of a contract terminated for the convenience of the Government, the entry in Item 14 of the modification may be limited to --

(i) A reference to the letter determination; and

(ii) A Statement of the net amount determined to be due in settlement of the contract.

(6) Include subject matter or short title of solicitation/contract where feasible.

(i) Item 16B. The contracting officer's signature is not required on solicitation amendments. The contracting officer's signature is normally affixed last on supplemental agreements.

STANDARD FORM 30 BACK (REV. 10-83)

UNIT 7 — STANDARDS OF ETHICAL CONDUCT

UNIT OBJECTIVES

AFTER READING THE MATERIAL IN THIS UNIT AND COMPLETING THE REVIEW EXERCISES, YOU WILL BE ABLE TO—

- Determine whether the behavior described falls within acceptable DOS employee standards of conduct; and
- List DOS regulations that apply to a particular situation or behavior.

IMPORTANCE OF UNIT TO COR

Each year, the Federal Government spends billions of dollars on acquisitions. With this magnitude of spending, it is inevitable that public officials who participate in the acquisition process will come under close public scrutiny and may occasionally be subjected to situations that may lead to improprieties, abuse of office, fraud, or theft.

By virtue of their unique position and responsibilities regarding the acquisition process, CORs are particularly susceptible to improper influences from those who seek to do business with the Government.

As a COR, you not only represent the Contracting Officer and the Department of State, but the public interest as well. Because of your duties as a COR, you have a responsibility to uphold the public trust. This means that you should, at all times, conduct yourself in an ethical and lawful way.

Therefore, CORs should take particular care to familiarize themselves with both Government-wide and departmental regulations governing standards of ethical conduct for Government employees. This section briefly discusses those ethical conduct standards that are particularly relevant to CORs.

There are three sets of guidelines to guide you in your conduct as a COR. They are:

- [FAR Part 3](#)

- Section [6-FAH-2 H-150 of the COR Handbook](#)
- [3 FAM 4130](#)

GIFTS

Employees are prohibited from soliciting or accepting gifts from prohibited sources or gifts given because of their official position. The term “prohibited source” includes anyone seeking business with or official action by an employee’s agency and anyone substantially affected by the performance of an employee’s official duties. For example, a company bidding for an agency contract or a person seeking an agency grant would be a prohibited source of gifts to employees of that agency.

The term “gift” is defined to include nearly anything of monetary value. (i.e., gratuity, favor, discount, entertainment, hospitality, loan or forbearance.) However, it does not include items that clearly are not gifts, such as publicly available discounts and commercial loans and it does not include certain inconsequential items, such as coffee, donuts, greeting cards and certificates.

There are several exceptions to the prohibitions against gifts from outside sources. For example, with some limitations, employees may accept:

- Gifts motivated by a family relationship or personal friendship;
- Free attendance at certain widely-attended gatherings, such as conferences and receptions, when the cost of attendance is borne by the sponsor of the event; and
- Food, refreshments and entertainment at certain meetings or events while on duty in a foreign country.

CONFLICTING FINANCIAL INTERESTS

The Government-wide Standards of Ethical Conduct deal with Government employees’ participation in matters affecting a personal financial interest. Basically, the standards prohibit an employee from participating “personally and substantially” as a Government employee in a matter in which any of the following individuals or organizations has a financial interest:

- The employee, the employee’s spouse, the employee’s minor child, or the employee’s general partner;
- An organization in which the employee serves as an officer, director, trustee, general partner, or employee; or

- A person or organization with which the employee is negotiating for prospective employment or has an arrangement for prospective employment.

In acquisition matters, this means that a Contracting Officer, COR, proposal evaluator, source selection official, or any other Government official having a financial interest in one or more offerors responding to a proposal would be prohibited from engaging in decisions, approvals, disapprovals, recommendations, and investigations; providing advice; or making any other significant effort regarding the acquisition process.

This includes participating in drafting specifications or statements of work for acquisitions when the drafter expects a company in which he or she has a financial interest to submit a proposal.

Criminal penalties may be imposed under 18 USC 208 for violations of these prohibitions. The Standards provide alternatives to non-participation that may involve selling or giving up the conflicting financial interest or obtaining a statutory waiver that will permit the employee to continue to perform specific official duties. Consult with your deputy ethics counselor for full details.

IMPARTIALITY IN PERFORMING OFFICIAL DUTIES

There may be circumstances other than conflicting financial interests in which an employee should not perform official duties in order to avoid an appearance of loss of impartiality.

Employees should obtain specific authorization before participating in certain Government matters where their impartiality is likely to be questioned. These matters include those:

- Involving specific parties, such as contracts, grants or investigations, that are likely to affect the financial interests of members of employees' households; or
- In which persons with whom employees have specific relationships are parties or represent parties. This should include, for example, matters involving employers of spouses or minor children, or anyone with whom employees have or seek a business or financial relationship.

[Executive Order \(E.O.\) 11222](#) extends this policy somewhat in providing that “an employee need not have a financial interest that actually conflicts with his or her duties to violate the prohibition of Executive Order 11222. Any financial interest that could reasonably be viewed as an interest which might

compromise the employee's integrity, whether or not this is in fact true, is subject to this prohibition."

Generally, employees who will have a conflict of interest, as described above, must disqualify themselves from participating in the acquisition process. However, this discussion of conflict of interest is only a general treatment of a fairly complex subject.

Government employees who are required to participate in a particular procurement that may present them with a conflict of interest should refer to the applicable sections of E.O. 11222 for full details.

Consult your deputy ethics counselor for the procedure by which employees may be authorized to participate in such matters when it serves the agency's interests.

USE OF OFFICIAL INFORMATION

The public interest requires that certain information in the possession of the Government be kept confidential, and released only with general or specific authority under Department or other regulations. Such information may involve the national security or be private, personal, or business information that has been furnished to the Government in confidence. In addition, information in the possession of the Government and not generally available may not be used for private gain.

The "Standards of Conduct" include a prohibition against engaging in financial transactions using nonpublic information, or allowing the improper use of nonpublic information to further private interests.

Most of the prohibitions against use of official information are relevant to the regulations governing conflict of interest. Government employees are sometimes able to obtain information about an action the Government is about to take or some other matter that is not generally known. Such a use of official information is clearly a violation of a public trust. Employees shall not, directly or indirectly, make use of official information not made available to the general public, for the purpose of furthering any private interest.

PROTECTING THE INTEGRITY OF THE ACQUISITION PROCESS

The term, "integrity of the acquisition process," in this instance, means allowing private sector firms to compete for the Government's business on a scrupulously fair basis. The emphasis here is on the word **fair**. Not only is

fairness a prerequisite in Government acquisition due to the Government's unique position as representative of the American people, but fairness also helps ensure that the Government will obtain its supplies and services at the best price available.

Government personnel who are associated with the acquisition process have a responsibility to protect its integrity, maintaining fairness in the Government's treatment of all vendors. There are numerous points within the acquisition process where the potential to lose this fairness is high.

For example:

Pre-solicitation. Allowing a vendor or vendors access to information on a particular acquisition (especially the specification or work statement) before such information is available to the business community at large may give the vendor(s) receiving the information an unfair advantage over others.

Specifications/Work Statements. Intentionally writing an unnecessarily restrictive specification or work statement that would effectively exclude the products or services of a vendor and/or increase the prospects for award to another vendor is an obviously unfair practice. Not only does this give advantage to one or more vendors over others, but it also restricts competition and makes it more likely that the Government will ultimately pay a higher price.

Confidentiality of Offeror's proposals. From the time proposals are received in response to a solicitation until a contract is awarded, all information concerning the proposals, including their number and submitters, must be held in strict confidence. Should this information become available to one or more offerors, it could put that offeror(s) at a distinct advantage.

SEXUAL HARASSMENT

Sexual harassment is defined as deliberate, unsolicited verbal comments, gestures, or physical contact of a sexual nature that are unwelcome.

The regulations specifically prohibit this conduct in relationships between Department personnel who take or recommend action on a grant or contract and the grantee or contractor.

PROCUREMENT INTEGRITY ACT—FAR 3.104

Following is a discussion of the [Procurement Integrity Act](#). It has far-reaching implications not only in numbers and types of transactions covered but also in extending to post-employment situations. In addition, this statute places

restrictions on a broadly defined category of Government employees as well as on contractors.

The “procurement integrity” statute, 41 U.S.C 423 (the “Act”), was enacted to prevent improper practices in the procurement of supplies and services. The Act prohibits certain activities by competing contractors and Government procurement officials during the conduct of a Federal agency procurement. In general, these prohibited activities involve:

- Prohibition on disclosing procurement information,
- Prohibition on obtaining procurement information, or
- Soliciting or disclosing proprietary or source selection information.

To determine how the Act is applicable, it is necessary to determine whether a Federal employee is “participating personally and substantially.” [FAR 3.104-1](#) defines “participating personally and substantially” as follows:

(1) Active and significant involvement of an official in any of the following activities directly related to that procurement:

(i) Drafting, reviewing, or approving the specification or statement of work for the procurement.

(ii) Preparing or developing the solicitation.

(iii) Evaluating bids or proposals, or selecting a source.

(iv) Negotiating price or terms and conditions of the contract.

(v) Reviewing and approving the award of the contract.

(2) “Participating personally” means participating directly, and includes the direct and active supervision of a subordinate's participation in the matter.

(3) “Participating substantially” means that the official's involvement is of significance to the matter. Substantial participation requires more than official responsibility, knowledge, perfunctory involvement, or involvement on an administrative or peripheral issue. Participation may be substantial even though it is not determinative of the outcome of a particular matter. A finding of substantiality should be based not only on the effort devoted to a matter, but on the importance of the effort. While a series of peripheral involvements may be insubstantial, the single act of approving or participating in a critical step may be substantial. However, the review of procurement documents solely to determine compliance with regulatory, administrative, or budgetary procedures, does not constitute substantial participation in a procurement.

When there is a question whether an individual is “participating personally and substantially,” the Contracting Officer should analyze the individual’s activities to determine whether there is both personal and substantial involvement in a procurement.

SOLICITING OR DISCUSSING EMPLOYMENT

FAR 3.104-3(c) states:

Actions required when an agency official contacts or is contacted by an offeror regarding non-Federal employment (subsection 27(c) of the Act).

(1) If an agency official, participating personally and substantially in a Federal agency procurement for a contract in excess of the simplified acquisition threshold, contacts or is contacted by a person who is an offeror in that Federal agency procurement regarding possible non-Federal employment for that official, the official must—

(i) Promptly report the contact in writing to the official’s supervisor and to the agency ethics official; and

(ii) Either reject the possibility of non-Federal employment or disqualify himself or herself from further personal and substantial participation in that Federal agency procurement (see 3.104-5) until such time as the agency authorizes the official to resume participation in that procurement, in accordance with the requirements of 18 U.S.C. 208 and applicable agency regulations, because—

(A) The person is no longer an offeror in that Federal agency procurement; or

(B) All discussions with the offeror regarding possible non-Federal employment have terminated without an agreement or arrangement for employment.

OFFERING OR ACCEPTING A GRATUITY

The phrase “gratuity or other thing of value” is defined to include any gift, favor, entertainment, transportation, lodgings, meals, services, training, or other item having monetary value.

It does **not** include:

- Modest items of food and refreshments;
- Loans from banks and financial institutions;

- Discounts available to the general public;
- Plaques and certificates having no intrinsic value;
- Anything paid for by the Government, secured under Government contract or accepted by the Government under specific statutory authority; or
- Training to facilitate use of its products provided by a vendor whose products are furnished under Government contract.

DISCLOSING PROPRIETARY OR SOURCE SELECTION INFORMATION

During the conduct of any procurement, *no person* who has access to proprietary information shall make unauthorized disclosure of that information. This prohibition applies to all Federal employees, not just officials “participating personally and substantially”.

No person or other entity may disclose contractor bid or proposal information to any person other than one authorized in accordance with applicable agency regulations or procedures by the head of the agency or designee, or the Contracting Officer, to receive such information.

FAR 2.101 defines “Source Selection Information” as:

[A]ny of the following information that is prepared for use by an agency for the purpose of evaluating a bid or proposal to enter into an agency procurement contract, if that information has not been previously made available to the public or disclosed publicly:

- (1) Bid prices submitted in response to an agency invitation for bids, or lists of those bid prices before bid opening.*
- (2) Proposed costs or prices submitted in response to an agency solicitation, or lists of those proposed costs or prices.*
- (3) Source selection plans.*
- (4) Technical evaluation plans.*
- (5) Technical evaluations of proposals.*
- (6) Cost or price evaluations of proposals.*
- (7) Competitive range determinations that identify proposals that have a reasonable chance of being selected for award of a contract.*
- (8) Rankings of bids, proposals, or competitors.*

(9) Reports and evaluations of source selection panels, boards, or advisory councils.

(10) Other information marked as “Source Selection Information-See FAR 2.101 and 3.104” based on a case-by-case determination by the head of the agency or the contracting officer, that its disclosure would jeopardize the integrity or successful completion of the Federal agency procurement to which the information relates.”

POST-EMPLOYMENT RESTRICTIONS

FAR 3.104-2(b)(3) states: “Post employment restrictions are covered by 18 U.S.C. 207 and 5 CFR Parts 2637 and 2641, which prohibit certain activities by former Government employees, including representation of a contractor before the Government in relation to any contract or other particular matter involving specific parties on which the former employee participated personally and substantially while employed by the Government.”

Questions related to individual post-employment situations should be directed to the appropriate agency ethics official.

Although the above-mentioned requirements may have some punitive aspects in the event they are violated, they should be understood in terms of their basic intent, i.e., to ensure the integrity of these processes. They also assist individuals to withstand pressures to approve the expenditure of funds for purposes or recipients that could not otherwise stand the tests of objective evaluation. If they are violated, however, individuals can expect serious consequences. There are documented instances of individuals spending time in jail, being fired or removed from positions of influence and contractors being debarred as a result.

UNIT 7 REVIEW EXERCISE

Answer the following questions. Then, check your answers against the ones in the [Answers](#) section.

1. With limitations, the prohibition against accepting gifts states that it is permissible to accept free attendance at certain widely attended gatherings, such as conferences and receptions, when the cost of attendance is borne by the sponsor of the event.

TrueFalse

2. Once a person is no longer employed by the Government, restrictions on representing a contractor before the Government no longer apply.

TrueFalse

UNIT 7 EXERCISE ANSWERS

1. **TRUE.** Explanation: There are several exceptions to the prohibitions against gifts from outside sources. For example, with some limitations, employees may accept...free attendance at certain widely-attended gatherings, such as conferences and receptions, when the cost of attendance is borne by the sponsor of the event. (See Page [7-2](#).)

1. **FALSE.** Explanation: Post-employment restrictions are covered by 18 U.S.C. 207 and 5 CFR Parts 2637 and 2641, which prohibit certain activities by former Government employees. (See Page [7-9](#).)

UNIT 7 SUMMARY

As a COR, you not only represent the Contracting Officer and the DOS, but the public interest as well. Because of your duties as a COR, you have a responsibility to uphold the public trust. This means that you should conduct yourself in an ethical and lawful manner.

The DOS has written regulations to guide you in your conduct as a COR: [3 FAM 4130](#) and [6 FAH-2](#).

Failure to comply with either or both of these standards of conduct can result in:

- Discharge;
- Fines;
- Imprisonment; or
- All of the above.

This unit discusses:

- Gifts
- Conflicting Financial Interests
- Impartiality in Performing Official Duties
- Use of Official Information
- Protecting the Integrity of the Acquisition Process
- Sexual Harassment
- Procurement Integrity Act—FAR 3.104
 - Soliciting or Discussing Employment
 - Offering or Accepting a Gratuity
 - Disclosing Proprietary or Source Selection Information
 - Post-Employment Restrictions

REMINDERS TO CORs

The following is not an exhaustive listing, but indicates some known pitfalls to be aware of and avoid. As a COR, you should remember the following points:

- **DON'T** make commitments of any type to provide funding to non-Federal sources or solicit “unsolicited” proposals as a means of making funds available. Examples include promises to support conferences or meetings, to make up a shortfall in non-Federal funding, etc. If such requests can be anticipated,
- **DO** seek the advice and assistance of cognizant contracts personnel as to propriety of the action and the choice of legal instrument.
- **DON'T** provide any information to non-Federal sources or other Federal employees who do not have “a need to know” about any planned or pending contract. Certain information, i.e., proprietary or source selection information, is prohibited from being released, and the release of other information may be inappropriate in a given instance.
- **DO** refer any requests for information, either written or oral, about planned or pending actions to cognizant contracts personnel.
- **DON'T** accept money or anything of more than nominal value either as an individual or on behalf of the organization from any non-Federal organization. Promotional materials such as pencils or magnets are considered to have nominal value.
- **DO** consult cognizant contracts personnel about the propriety of participating in vendor promotional training. DO participate in demonstrations of product capability as a means of determining potential sources but only as a general source of information and not in relation to a requirement for which the acquisition process has already begun.
- **DO** ensure that you disclose your financial interests in any organizations to whom the Department may potentially award grants or contracts.
- **DON'T** requisition for equipment or supplies that are not essential for operations or mission accomplishment or use or allow others to use Government-owned equipment or supplies for unauthorized purposes.
- **DO** use common sense. If you are being asked to do a favor in making funding available or a project has sensitivities attached to it, either political, social or economic, bring it to the attention of your management, as well as contracts and/or legal staff.

UNIT 8 — CONTRACT TERMINATION & CLOSEOUT

UNIT OBJECTIVES

AFTER READING THE MATERIAL IN THIS UNIT AND COMPLETING THE REVIEW EXERCISES, YOU WILL BE ABLE TO—

- Match the appropriate termination process to a particular situation; and
- List the steps of closing out a contract upon completion.

INTRODUCTION

Most contracts come to an end by being successfully completed. Most contracts end when the work is completed, inspected, accepted, payment is made, and the period of performance is over. After completion, the contractor, COR and Contracting Officer formally close out the contract.

Sometimes, however, the Government decides for its own reasons that the contract must be ended. This process is called “termination for the convenience of the Government.”

Occasionally, a contractor performs poorly or not at all, and the Government, after amassing proper documentation and (sometimes) attempting to require corrective action, will terminate the contract for the fault of the contractor. This is called “termination for default.”

CONTRACT TERMINATION

The following information is taken from A / O P E's [COR Handbook](#), (April 2000 edition). The entire text of the *COR Handbook* can be found on A / O P E's Intranet site, <http://www.statebuy.gov/home.htm>.

6 FAH-2 H-543.2 TERMINATIONS

a. Situations may arise when the work contracted for does not run to completion. Two standard contract clauses are designed to cover this eventuality:

- The “Termination for Convenience of the Government” clause.
- The “Default” clause.

No matter which type of termination is issued, or the extent of the terminated portion of the work, the decision to terminate is a unilateral right of the U.S. Government.

b. Both types of terminations can be either partial or complete; that is, all or any part of the work can be subject to the termination. The contractor must complete the portion that is not terminated. The contractor has no contractual right not to continue with the remaining work.

6 FAH-2 H-543.2-1 TERMINATION FOR CONVENIENCE

a. The “Termination for Convenience” clause gives the U.S. Government the right to cancel a contract when to do so is in the U.S. Government’s best interest, without regard to the contractor’s ability and readiness to perform. The contractor assumes this risk under the contract terms.

b. A termination for convenience requires that a financial settlement be made for the work that has been accomplished under the contract up to the effective date of the termination. The contractor is paid for his or her work on the terminated part of the contract as well as a reasonable allowance for profit on work done and reasonable settlement expenses without profit or fee. The contractor is not paid any profit or fee on work that was not performed before the effective date of termination.

c. Once it is determined that a contract is to be terminated, the Contracting Officer initiates the termination immediately to preclude the further incidence of cost.

6 FAH-2 H-543.2-2 TERMINATION FOR DEFAULT

a. The “Termination for Default” clause allows the Government to terminate the contract when the contractor fails to make progress or to perform any other contract requirements within the period specified by the “cure notice.” Terminations for default usually occur in fixed-price contracts.

b. Handling terminations for fixed-price contracts.

(1) Fixed-price contracts may be terminated for default if the contractor fails to:

- (a) Make delivery of the supplies, or to perform the services within the time specified in the contract;
- (b) Perform any other provision of the contract including public policy provisions (such as equal employment opportunity standards); or,
- (c) Make sufficient progress to ensure timely or successful performance of the contract.

(2) In the first instance, the notice of Termination for Default may be issued immediately. In the latter two cases, however, the Contracting Officer issues a “show cause” or “cure notice” to the contractor, citing the failure and allowing at least 10 days for the contractor to submit a plan to cure the problem. If the contractor’s plan does not offer a reasonable solution to the problem, the contractor may then be defaulted for failure to perform. [FAR Part 49](#) describes the procedures, factors, and contents of notices to be considered when such actions are taken.

(3) Excusable delays. The default clause in fixed-price contracts states the general reasons that may excuse a contractor’s delay in performance. For example, a delay is excused when it is caused by a factor beyond the contractor’s control and is not his/her negligence. Examples of possible excusable delays include acts of God (fire, flood, etc.), acts of the Government, and strikes. Delays arising from excusable causes are not excused beyond the time the excuse continues to prevent performance. A situation might arise, for example, when a month’s delay in delivery or performance is excused, but the contractor’s own action and negligence causes a second month’s delay. In this case, the right to terminate for default would not be lost with respect to the second month’s delay.

(4) Effect of default. When a fixed-price contract is terminated for default, the contractor is not entitled to compensation for work performed prior to the termination and not yet accepted by the U.S. Government, and the U.S. Government is entitled to repayment of any advance or progress payment that applies to such work. The Government may, however, order the contractor to deliver any completed or partially completed work produced or acquired for the terminated part of the contract. The contractor must protect and preserve any property in which the

Government has an interest (as directed by the Contracting Officer) and is entitled to compensation for any expenses involved.

(5) Right to buy against account of defaulted contractor. When a fixed-price contract is terminated for default, the Government may repurchase the same or substantially similar items/services to those the contractor was to furnish and hold the terminated contractor liable for the excess costs of the replacement procurement. However, repurchase action must be initiated as soon as practicable after the default termination and at as reasonable a price as possible, considering the quality and time factors.

c. Handling terminations on cost-reimbursement type contracts.

(1) The provisions for default termination contained in cost-reimbursement type contracts are part of the general “Termination” clause, which covers both convenience and default terminations. Excusable contractor delays are described in a separate clause entitled “Excusable Delays.”

(2) The distinction between a default and a convenience termination is not so great under a cost-reimbursement contract as it is in the fixed-price situation. When a cost type contract is terminated for convenience or for default, the contractor receives all allowable costs incurred up to the time of termination, and he or she is not liable for repurchase costs if the Government purchases replacement supplies or services.

Note: *Departmental procedures require that COs intending to terminate a contract for convenience or for default consult with A / O P E and the Office of the Legal Advisor (L / B A) prior to initiating termination actions.*

CONTRACT CLOSEOUT

Closing out a contract is an important process, and one all-too-often neglected. Although closeout is mostly performed by the Contracting Officer, the COR has important responsibilities during closeout, helping the Contracting Officer to insure that all aspects of performance, delivery, payment, and reporting have occurred.

The COR reports that performance was satisfactory (or not), and that deliverables are (upon completion and correction if necessary) acceptable.

When the contract is complete, the Contracting Officer (with the help of the COR) verifies:

- a. **All services have been rendered;** all articles have been delivered and accepted. The contract file must include all inspection and acceptance documents or a statement from the COR that all services and deliveries required by the contract have been performed or delivered in accordance with the terms of the contract and are acceptable to the Government. Any discrepancies between performance or delivery and contractual requirements must be reconciled before the contract file is closed.
- b. **All payments and collections have been made.** All vouchers and contractor invoices that support partial, progress, and final payments must be included in the contract file.
- c. **Release from liabilities, obligations, and claims has been obtained from the contractor.** The file must also include documentation that settles questions of disallowed costs or discrepancies between payments, deliveries, and billings.
- d. **All administrative actions have been accomplished and documented.**
 - (1) Contract modifications and their supporting documentation, resulting from additions, deletions or other changes to contract terms and conditions must be included in the contract file.
 - (2) Records relating to Government owned property; documentation regarding inventories, patents, royalties, copyrights, publications, tax exemptions; and correspondence with Congress, GAO, etc., must also be included in the contract file.
 - (3) The COR shall complete an evaluation of the contractor's performance on the [DS 1771, SF 1421, or SF 1420](#). A copy should be sent to the contractor as well, and any comments received should be considered.

Model formats for contract closeout documentation are included on A / O P E's Intranet site, <http://aope.a.state.gov/>.

UNIT 8 REVIEW EXERCISE

Answer the following questions. Then, check your answers against the ones in the [Answers](#) section.

1. What is the process called when the Government ends a contract for its own reasons?
 - a. Termination for default
 - b. Termination for cause
 - c. Termination for convenience

2. What is the process called when the Government ends a contract because of poor performance or no performance on the part of the contractor?
 - a. Termination for default
 - b. Termination for convenience
 - c. Termination for nonprofessional actions

3. The Contracting Officer must consult with which officers prior to Termination?
 - a. The Inspector General
 - b. The Office of the Legal Advisor (L / B A)
 - c. The Executive Office

4. What is the COR's role during contract closeout?
 - a. The COR has no role during closeout
 - b. The COR assists the Contracting Officer during closeout
 - c. The COR has all responsibility for contract closeout

UNIT 8 EXERCISE ANSWERS

1. What is the process called when the Government ends a contract for its own reasons?

b. Termination for convenience

(See Page **8-2**.)

2. What is the process called when the Government ends a contract because of poor performance or no performance on the part of the contractor?

a. Termination for default

(See Page **8-2**.)

3. The Contracting Officer must consult with which offices prior to Termination?

b. The Office of the Legal Advisor

(See Page **8-4**.)

4. What is the COR's role during contract closeout?

b. The COR assists the Contracting Officer during closeout

(See Page **8-4**.)

GLOSSARY OF TERMS AND ACRONYMS

This Glossary provides a reference to frequently used terminology relating to Government acquisition. Please note that in the event that these definitions are different from definitions found in the FAR and/or DOSAR, the FAR and/or DOSAR definitions take precedence.

A / O P E	Office of the Procurement Executive
A/OPR/ACQ	Office of Acquisitions
A/SDBU	Office of Small and Disadvantaged Business Utilization
Acceptance	The act of an authorized representative of the U.S. Government acknowledging that the supplies or services are in conformity with the contract requirements.
Administrative Controls	Safeguards that ensure that contracting will be carried out in conformity with applicable regulations and Department policy.
Amendment	Modification made to a solicitation.
A S B C A	Armed Services Board of Contract Appeals
B A F O or B F O	Best and Final Offers
Bidder's List (also called Source List)	List of prospective contractors
BPA	Blanket Purchase Agreement
Cardinal Changes	Modifications to an existing contract that are beyond the general scope of that contract and are so extensive that a new procurement should be used.
CBD	Commerce Business Daily
CFR	Code of Federal Regulations
CG	Comptroller General
Change Order	Unilateral action taken by the Contracting Officer in order to modify the drawings, designs, specifications, method of shipping or packing, place of inspection, delivery, or acceptance of an existing contract.
Changed Conditions	Construction site/repair conditions that differ significantly from conditions indicated in the contract, or conditions ordinarily encountered in the performance of the type of work in the contract.
C I C A	Competition in Contracting Act
C O	Contracting Officer

Competitive Range	Those proposals, which, after evaluation by the T E P, have a reasonable chance of receiving the award, both from a technical and cost standpoint.
Constructive Change Order	Informal requests for additional work or services caused by some act or omission to act on the part of the U.S. Government which causes a contractor extra work, delays, or money.
Contract	A legal instrument providing for the purchase, lease or barter of property or services for the direct benefit of the U.S. Government.
Contract Administration	The monitoring of the contractor's performance in order to assure compliance with performance requirements and contract provisions.
Contract Modification	Any written alterations in the specifications, delivery point, date of delivery, contract period, price, quantity, or other provision of an existing contract.
Contracting Officer	An official authorized to enter into or administer procurement contracts and make related determinations and findings.
Contracting Officer's Representative (COR)	The individual in the requirements office who is responsible for the technical direction and evaluation of the contractor's performance.
COR	Contracting Officer's Representative
Cost Estimate	A written calculation of all items included in the scope of the work, tabulated under appropriate cost headings (direct costs, labor, overhead, and profit).
Cost-Reimbursement Contract	Contract in which the buyer and seller agree on an estimate of contract costs. The buyer agrees to reimburse the seller for reasonable, allowable, and allocable costs necessary to complete the work.
CR	Cost-Reimbursement Contract
Cure Notice	A document the Contracting Officer sends to a contractor to notify the contractor that the contract may be terminated by reason of default if the condition endangering performance of the contract is not corrected in 10 days.
D&F	Determination and Findings
Determinations and Findings	Written approval by an authorized official that is required by statute or regulation as a prerequisite to taking certain contracting actions.
DOSAR	Department of State Acquisition Regulation
Excusable Time Delay	Failure to perform that is beyond the control and without fault or negligence of the contractor.
FAH	Foreign Affairs Handbook
FAM	Foreign Affairs Manual

FAR	Federal Acquisition Regulation
FFP	Firm-Fixed-Price Contract
Firm Fixed-Price Contract	A contract that provides for a price that is not subject to any adjustment by reason of cost experience of the contractor in the performance of the contract.
FMO	Financial Management Officer
FMP	Bureau of Finance and Management Policy
F O I A	Freedom of Information Act
FSI	Foreign Service Institute
FSN	Foreign Service National
GAO	General Accounting Office
GFP	Government Furnished Property
GOVERNMENTWIDE POINT OF ENTRY (GPE)	The single point where Government business opportunities greater than \$25,000, including synopses of proposed contract actions, solicitations, and associated information, can be accessed electronically by the public. The GPE is located at http://www.fedbizopps.gov .
HCA	Head of the Contracting Activity
IFB	Invitation for Bids
Indefinite-Quantity Contract	A contract used for procurements in which the exact number of deliverable items is not known at the time of contracting. The contract provides for a minimum and maximum amount of goods/services that may be ordered under the contract.
Inspection	The examination and testing of supplies and services to determine whether they conform to contract requirements.
L / B A	Office of the Legal Advisor, Building and Acquisitions
Labor-Hour Contract	A contract that provides for the procurement of property or services on the basis of direct labor-hours at specified, fixed hourly rates (which include direct and indirect labor, overhead, and profit).
Letter Contract	A written authorization to begin work issued prior to the negotiation of a formal contract.
Level-of-Effort Contract	A contract that specifies the number and type of person-hours which the contractor will apply in pursuing the project.
Modification	See Contract Modification, above.
Negotiation	The procedure for awarding contracts without sealed bidding. This method of procurement is used when sealed bidding is not feasible or practicable. Under negotiation, the lowest offeror does not necessarily receive the award, since technical and other factors are considered as well as cost.

OFPP	Office of Federal Procurement Policy
O I G	Office of the Inspector General
OMB	Office of Management and Budget
PSC	Personal Services Contract
Requests for Proposals (RFP)	The U.S. Government's written solicitation to prospective offerors to submit a proposal based on the terms and conditions set forth therein. Proposal evaluation and contractor selection are based on the factors for award as stated in every competitive RFP.
Responsible Bidder	One who has the technical and financial capacity to secure the necessary resources to deliver the goods or services.
Responsive Bid	A bid that conforms exactly to the requirements in the Invitation for Bids (IFB).
RFP	Request for Proposals
SBA	Small Business Administration
Sealed Bidding	Acquisition by competitive sealed bids. This method of procurement requires that specifications be written describing the requirements of the U.S. Government clearly, accurately, and completely, so that the evaluation of bids can be based on the lowest bid submitted by a responsive and responsible bidder.
SF	Standard Form
Show Cause Letter	A document the Contracting Officer sends to a defaulting contractor to notify the contractor that the contract may be terminated by reason of default unless the contractor can prove in 10 days that the condition was not his or her fault.
SOW	Statement of Work
Specifications	Clear and accurate description of the technical requirements of a service or supply contract.
Statement of Work	Written definition of work to be performed, which establishes standards sought for the goods or services to be supplied.
T for C	Termination for Convenience
T for D	Termination for Default
Technical Evaluation Panel (T E P)	One or more technical staff members designated by the requirements office to evaluate technical proposals, discuss the work with all offerors, and prepare a selection recommendation.
T E P	Technical Evaluation Panel
Termination for Convenience	A contract clause designed to give the U.S. Government a unilateral right to terminate the contract when it no longer needs or requires the products or services.

Termination for Default	A contract clause that allows the Government to terminate a contract when the contractor fails to perform or fails to make progress so as to endanger performance.
Time Delay	An interruption during which services, supplies, or work are not delivered in accordance with the performance time schedule stated in the contract.
Time-and-Materials Contract	A contract that provides for payment of supplies and services on the basis of incurred direct labor hours (at fixed rates) and materials (at cost).
UCF	Uniform Contract Format
USC	United States Code

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